83-1614

No. ..-....

IN THE

Supreme Court of the United States

October Term, 1983

SUE GOTTFRIED and MARCELLA M. MEYER for themselves and on behalf of the deaf and hearing impaired population within the Greater Los Angeles area,

Petitioners,

vs.

UNITED STATES OF AMERICA; DEPARTMENTS OF HEALTH, EDUCATION AND WELFARE; EDUCATION; AND JUSTICE; FEDERAL COMMUNICATIONS COMMISSION, and COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA dba KCET-TV,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

ABRAHAM GOTTFRIED,
Professional Corporation,
2049 Century Park East,
Suite 2400,
Los Angeles, Calif. 90067,
(213) 277-5000,

STANLEY FLEISHMAN,*
A Professional Corporation,
2049 Century Park East,
Suite 3160,
Los Angeles, Calif. 90067,
(213) 551-2923,

CHARLES M. FIRESTONE,
Communications Law Program,
UCLA School of Law,
405 Hilgard Avenue,
Los Angeles, Calif. 90024,
(213) 825-6211.

**Counsel of Record.*

Of Counsel:
RODNEY R. JONES,
PAUL L. HOFFMAN,
LAW INSTITUTE FOR THE DISABLED AND ELDERLY,
Southwestern University School of Law,

SAMUEL ROSENWEIN.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

The Ninth Circuit reversed a District Court judgment which ordered the executive department of the government and/or the Federal Communications Commission to promulgate a regulation defining the obligation that Section 504 of the Rehabilitation Act imposes on television broadcasters receiving Federal financial assistance, to make their programs understandable to hearing impaired people. The questions are:

1. Whether the executive department of the government abused its discretion by arbitrarily failing to promulgate a regulation defining the obligation imposed by section 504 of the Rehabilitation Act on television broadcasters receiving Federal financial assistance, to make their programs understandable to hearing impaired people, particularly when:

A. The executive department explicitly acknowledged the *necessity* for such a regulation, explicitly acknowledged responsibility for issuing it promptly, and repeatedly assured the District Court that it would be forthcoming expeditiously; and

B. The FCC asserts that without the regulation it is unable to determine whether its licensees receiving Federal financial assistance are in compliance with the Rehabilitation Act; and

C. The District Court found that without the regulation, hearing impaired people are subjected to discrimination and are denied access to ideas, information and entertainment in violation of section 504 of the Rehabilitation Act, the Communications Act, and the Constitution; and

D. The Court held in *Community Tel. of Southern Cal. v. Gottfried*, ___ U.S. ___ (1983) that rule-making is the best method of defining the duty of public broadcasters

under the Rehabilitation Act, after the Solicitor General assured this Court that the Department of Justice was preparing the *necessary* regulatory guidelines defining the obligation that section 504 imposes on broadcasters receiving Federal financial assistance.

2. Whether the FCC is required to issue a section 504 regulation, applicable to broadcasters, because it grants Federal financial assistance within the meaning of *Grove City College v. Bell*, ___ U.S. ___ (1984).

3. Whether the 1978 amendment to section 504 of the Rehabilitation Act requires the Commission, as an "executive agency," to issue a regulation applicable to television broadcasting.

4. Whether the FCC can continue to evade its duty under the Communications Act and the Constitution to issue a regulation to enable hearing impaired people to enjoy television broadcasting, especially since the executive department has failed to issue a regulation defining the responsibility of public broadcasters under the Rehabilitation Act.

5. Whether the Ninth Circuit erred by holding that *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) relieved public television station KCET of its obligation under section 504 to take positive steps to enable its deaf and hearing impaired viewers to benefit from television programs funded by the federal government.

6. Whether, in light of *Grove City College v. Bell*, section 504 applies to the full range of programs and activities conducted by public television station KCET.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

No. ..-....

IN THE

Supreme Court of the United States

October Term, 1983

SUE GOTTFRIED and MARCELLA M. MEYER for themselves and on behalf of the deaf and hearing impaired population within the Greater Los Angeles area,

Petitioners,

vs.

UNITED STATES OF AMERICA; DEPARTMENTS OF HEALTH, EDUCATION AND WELFARE; EDUCATION; AND JUSTICE; FEDERAL COMMUNICATIONS COMMISSION, and COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA dba KCET-TV,

*Respondents.**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioners SUE GOTTFRIED and MARCELLA M. MEYER, for themselves and on behalf of all others similarly situated, respectfully pray that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed and entered November 2, 1983.

*The caption reflects all interested parties.

Opinions Below.

The opinion of the Court of Appeals is reported at 719 F.2d 1017, and is set forth as Appendix "A" (App. 1-12). The orders, judgment, and findings of fact and conclusions of law of the District Court are unreported. The order entered March 20, 1980, is set forth as Appendix "B" (App. 13-14). It provides that the Department of Health, Education and Welfare (HEW) shall develop, prepare and promulgate by November 17, 1980, a compliance standard that sets forth the obligations of public broadcasters that receive Federal financial assistance, under section 504 of the Rehabilitation Act.

The District Court's order filed December 18, 1980 is set forth as Appendix "C" (App. 15). It extended the time within which to issue the regulation until February 17, 1981 and ordered the Department of Education (ED) to promulgate it.[1]

The revised final judgment, filed November 23, 1981, is set forth as Appendix "D" (App. 16-18). It provides in relevant part that the Attorney General[2] and the Federal Communications Commission (FCC) shall forthwith adopt and promulgate regulations setting forth the standards of compliance by public broadcasting stations with regard to section 504 of the Rehabilitation Act.

---

[1]When HEW split into the Department of Education and the Department of Health and Human Services, the function of preparing the regulation was administratively transferred to ED.

[2]On August 17, 1981, government counsel advised the District Court that the Attorney General had taken over from ED the responsibility for promulgating the regulation. On September 1, 1981, the Attorney General was substituted as a successor to HEW, having the primary responsibility for implementing and enforcing section 504.

The District Court's findings of fact and conclusions of law, filed November 17, 1981, in favor of petitioners and against the federal defendants, are set forth as Appendix "E" (App. 19-37).[3]

Jurisdiction.

The opinion of the Ninth Circuit was filed on November 2, 1983. A duly filed Petition for Rehearing was denied on January 3, 1984. The order denying said petition is set forth as Appendix "J" (App. 46). The Court has jurisdiction pursuant to 28 U.S.C. section 1254(1).

Statutes and Constitutional Provisions Involved.

Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794) and the relevant provisions of the Communications Act of 1934, as amended (47 U.S.C. § 151, *et seq.*) and the relevant provisions of the First and Fifth Amendments to the United States Constitution are set forth as Appendix "K".

Statement of the Case.

1. On March 13, 1978, prior to the filing of the complaint in the District Court, petitioners filed an administrative complaint with HEW alleging that public television station KCET, a recipient of Federal financial assistance, was violating section 504 of the Rehabilitation Act by failing to caption its programs to make this federally funded service

---

[3]The findings of fact, conclusions of law and order dismissing complaint against Community Television of Southern California, as amended November 2, 1981, are set forth as Appendix "F". The findings of fact, conclusions of law and order dismissing complaint against James L. Loper, entered October 23, 1981, are set forth as Appendix "G". The findings of fact, conclusions of law and order dismissing complaint against Corporation for Public Broadcasting, entered October 29, 1981, are set forth as Appendix "H". The findings of fact, conclusions of law and order dismissing complaint against Public Broadcasting System entered November 3, 1981, are set forth as Appendix "I".

available and understandable to hearing impaired people. On March 22, 1978 HEW replied, advising petitioners that it was unable to investigate the complaint in the absence of a policy clarification from Washington. No policy determination was made prior to the time petitioners filed their complaint in the District Court.

2. On December 12, 1978, petitioners MARCELLA M. MEYER and SUE GOTTFRIED for themselves and on behalf of all others similarly situated, and the GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., a California non-profit Corporation, filed an action for declaratory and injunctive relief seeking to establish and define the rights of hearing impaired persons to access to public broadcasting.[4] The District Court ruled that petitioners may maintain the action as a class on behalf of all persons within the viewing area served by defendant Community Television of Southern California dba KCET-TV (hereinafter "KCET"), and who are hearing impaired. Petitioners, class representatives MARCELLA M. MEYER and SUE GOTTFRIED, are both deaf.

Petitioners sued HEW as the executive department responsible for coordinating the implementation of section 504 and as one of the many agencies granting direct Federal financial assistance to KCET. When HEW was split into the Department of Health and Human Services (HHS) and the Department of Education (ED), those departments were substituted in the place of HEW. After the court was advised that the Attorney General had assumed the administrative

---

[4]Prior to the filing of the pre-trial order, Greater Los Angeles Council on Deafness, Inc. ("GLAD") was dismissed by the District Court for lack of standing. No appeal was taken from said order. Also prior to the filing of the pre-trial order, plaintiffs' prayer for compensatory and punitive damages was dismissed, and petitioners took no appeal from this order.

responsibility for coordinating and implementing section 504, and for promulgating the regulation applicable to public broadcasting, he was added as a party.

The FCC was named as licensor of KCET and as the executive agency responsible for regulating the broadcast industry.

The non-federal public broadcasting defendants are KCET, a public television station in Los Angeles, California, the Corporation for Public Broadcasting (CPB), a non-profit District of Columbia corporation incorporated pursuant to an Act of Congress, and Public Broadcasting Service (PBS), a non-profit District of Columbia corporation. PBS is a membership organization whose members are most of the licensees of the 281 non-commercial public television stations in the United States.[5]

3. On October 5, 1979, the Secretary of HEW authorized the Department of Justice to inform the District Court that section 504 is applicable to the full range of KCET's production and broadcasting activities. On October 26, 1979, HEW requested the District Court to permit it and other agencies that provide Federal financial assistance or regulate public television to establish a section 504 compliance standard for public television (App. 53-61).[6]

On March 20, 1980, the District Court ordered HEW to develop, prepare and promulgate with all speed, but no later than November 17, 1980, a compliance standard that sets

---

[5]The complaint also named James L. Loper, William J. Lamb and the California Public Broadcasting Commission. These defendants were dismissed by the District Court, and no appeal was taken from such dismissal.

[6]The request is set forth in HEW's "Opposition of the Department of Health, Education and Welfare to the Motions for Summary Judgment by plaintiffs and the public broadcasting defendants" relevant portions of which are set forth as Appendix "L" (App. 52-67).

forth the obligation under section 504 of public broadcasters that receive Federal financial assistance (App. 13, 22).[7]

4. On May 4, 1980, the Department of Education was established, and the HEW study group that was involved in preparing the compliance guideline was transferred to ED (App. 22). ED represented to the District Court that it had assumed from HEW the responsibility for promulgating the regulation (App. 22).

On October 31, 1980, ED moved the court for additional time, beyond November 17, 1980, to publish the regulation. The motion was heard on November 24, 1980, at which time ED advised the court that it was working on the regulation and would be in a position to publish it in the Federal Register by May 6, 1981 (App. 22). The District Court gave ED until February 17, 1981 to promulgate the regulation (App. 15). ED filed an appeal from the order and sought a stay from the Ninth Circuit, advising the court that while it accepted the responsibility for issuing the regulation, it could not complete the task before May 6, 1981. The stay was granted December 19, 1980.

On April 6, 1981, ED advised the District Court that preparation of the regulation was proceeding on schedule and would not be delayed by reason of the stay order issued by the Ninth Circuit. Counsel for ED stated:

> I have been told as late as last Friday that . . . the process of preparing the regulation will move forward. It is not going to be stopped for a new administration. It is not going to be stopped due to the Court of Appeals' order in this matter.

---

[7]HEW appealed solely because it was of the view that the court should not have set a time limit within which to promulgate the regulation. No stay was sought because HEW hoped that the regulation would be promulgated by the November 17, 1980 deadline set by the District Court.

On June 15, 1981, counsel for ED again advised the District Court that the department was working on the regulation, but could not advise the court as to a date when the regulation would be promulgated. The transcript of June 15, 1981 reads:

> MS. SOBOL [representing ED]: Good Morning, Your Honor. The Department of Education is proceeding with the promulgation process. The comment period on the notice of intent to regulate was closed on May 8th and more than thirty comments were received, some of them very extensive. The agency is summarizing and analyzing the comments and drafting regulations. It will be prepared for the Secretary's consideration in the near future.
>
> THE COURT: What is the near future? We have been waiting now for several years. What is the near future?
>
> MS. SOBOL: I am not prepared to give you a date, your Honor. The Office of Civil Rights is coordinating with other agencies involved, the Commerce Department and the FCC and the Justice Department, which now has the Executive Order authority under 504.

On August 17, 1981, ED did a complete about-face, and *for the first time* advised the District Court that it was not going to issue a regulation in accordance with the court's order (App. 24). ED advised the court that the Attorney General had assumed responsibility for coordinating section 504, and for preparing the public broadcasting regulation.

5. The Attorney General was substituted as a defendant on September 1, 1981. At the ensuing trial, the Deputy Assistant Attorney General for Civil Rights, Robert D'Agostino, testified that the Attorney General was then planning to promulgate the regulation and his hope was to have a final regulation in place by June 1982 (App. 25).

6. The District Court found that the FCC has a statutory and constitutional duty to issue a regulation defining the obligation of its licensees to make their programs understandable for hearing impaired people (App. 25-31).

7. On November 26, 1981, the District Court entered final judgment providing in relevant part (App. 17):

> 6. The Attorney General and the Federal Communications Commission shall forthwith adopt and promulgate regulations setting forth the standards of compliance of public broadcasting stations with section 504 of the Rehabilitation Act.

The judgment was based upon detailed findings and conclusions wherein the District Court expressly found that because of the failure of the executive department and the FCC to issue the required regulation, hearing impaired people were denied access to public television in violation of rights secured to them by the Rehabilitation Act, the Communications Act, and the Constitution (App. 31-33, 35-36).

8. On November 2, 1983, the Court of Appeals reversed the District Court's judgment ordering the promulgation of a section 504 regulation (App. 8-10). The court did not assert that any of the district court's findings of fact were "clearly erroneous." Indeed the Court of Appeals did not even address the District Court's findings and conclusions. *See, Pullman-Standard v. Swint*, 456 U.S. 273, 293 (1982).

REASONS FOR GRANTING THE WRIT.

Introduction.

The Ninth Circuit, the executive branch of government, and broadcasters have all interpreted *Community Television of Southern Cal. v. Gottfried*, ___ U.S. ___, 103 S.Ct. 885 (1983) as holding that public television broadcasters receiving Federal financial assistance have *no* duty to take positive steps to make their programs understandable and available to their hearing impaired viewers. This interpretation of *Gottfried* is plainly wrong.

In *Gottfried* the Court stated that no licensee "whether commercial or public, may simply ignore the needs of the hearing impaired in discharging its responsibilities to the community which it serves." *Id.* at 892. The underlying assumption of *Gottfried* was that the executive department responsible for coordinating section 504 of the Rehabilitation Act would promulgate a regulation defining the obligation that section 504 imposes on broadcasters receiving Federal financial assistance. 103 S.Ct. at 891 n. 11. The Court noted that in the Court of Appeals for the District of Columbia both the majority and Chief Judge McGowan were of the view that "rule making is generally a 'better, fairer, and more effective' method of implementing a new industry-wide policy than is the uneven application of conditions in isolated license renewal proceedings." *Id.* at 893. Judge McGowan was of the view that after the executive department promulgated a regulation applicable to public broadcasting, the FCC would use it as a guide in defining the obligation of its licensees — commercial and public — to make television available and accessible to hearing impaired people. *Gottfried v. FCC*, 655 F.2d 297, 317 (1981). This Court expressed a similar view, stating that "conceivably" the FCC might rely on regulations promulgated under the

Rehabilitation Act to require "extraordinary efforts" on the part of its licensees to make programming "universally accessible." 103 S.Ct. at 893.

The FCC represented to the Court of Appeals in *Gottfried* that it was taking steps to require its licensees to make programs available to deaf people (App. 31), but after this Court decided *Gottfried* the Commission did nothing.[8]

On *March 5, 1984* in *In re Application of Metromedia, Inc., Licensee for Station KTTV(TV) Los Angeles, California*, FCC File No. BTCCT-840215 KG, the licensee brazenly told the Commission:

> [I]t is now *well* established that television licensees are *not* subject to any general program captioning requirement. The Commission has repeatedly considered, and repeatedly rejected, proposals for captioning requirements (citation) and, the Commission's refusal to adopt such requirements has been affirmed by the Courts. *Gottfried v. FCC*, 655 F.2d 297 (D.C.Cir. 1981); *Community Television of Southern California v. Gottfried*, ___ U.S. ___.

Metromedia's Motion to Dismiss, pp. 16-17 (emphasis in original).

The Solicitor General represented to this Court in *Gottfried* that the Department of Justice was then in the process of "preparing regulatory guidelines concerning what obligation section 504 imposes on broadcasters." Brief for FCC, p. 30; Reply Brief for FCC, p. 9, n. 6. The Department of Justice, however, has failed to honor its commitment to this

---

[8]In *Golden West Broadcasting (KTLA-TV Transfer)*, ___ FCC 2d ___ (S.O. Feb. 27, 1984) the Commission repeated its old refrain that its licensees have no duty to caption programs "since there are no standards with regard to captioning. . . ." ¶13. The FCC defended this position, asserting that this Court, in *Gottfried*, did not "order" that rule making be undertaken.

Court.

The Ninth Circuit erroneously read *Gottfried* as holding that no agency of government is required to issue a regulation to make television programs available to the deaf community. In so holding, the Ninth Circuit has seriously undermined a statute enacted to establish "a comprehensive federal program aimed at improving the lot of the handicapped." *Consolidated Rail Corporation v. Darrone*, ___ U.S. ___ (1984).

The broad purposes of the Rehabilitation Act are set forth in the White House Conference on Handicapped Individuals Act, 88 Stat. 1631. *See*, 29 U.S.C.A. § 701, Historical Note. Congress there found that the benefits and fundamental rights of this society are often denied handicapped persons; that it is of critical importance to this nation that equality of opportunity, equal access to all aspects of society, and equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps; that the Congressional goal and final objective was to assure that all individuals with handicaps are able to live their lives independently, with dignity, and integrated into normal community living and working relationships; and that "*all levels of government must necessarily share responsibility for developing opportunities for individuals with handicaps.*" (Emphasis added). *Id.*

It is now eleven years since passage of the Rehabilitation Act, and the federal government has shamefully avoided application of this law to the medium of television supported by federal subsidy. The District Court correctly concluded:

> The federal government in failing to issue regulations applicable to public broadcasting, has deliberately fostered and promoted discrimination against deaf and hearing impaired persons seeking access to programs broadcast over public broadcasting facilities. . . . The

> action and inaction of the federal government has resulted in the denial to the deaf and hearing impaired of the enjoyment of rights, privileges, advantages and opportunities enjoyed by those who are not hearing impaired.

(App. 33). See *Pullman-Standard v. Swint, supra.*

I.

THE EXECUTIVE DEPARTMENT HAS ABUSED ITS DISCRETION BY FAILING TO PROMULGATE A REGULATION DEFINING THE OBLIGATION IMPOSED BY SECTION 504 ON TELEVISION BROADCASTERS RECEIVING FEDERAL FINANCIAL ASSISTANCE.

The District Court concluded (App. 35):

> The responsible government agencies, including the Federal Communications Commission, the Department of Justice, and the Department of Education have delayed unreasonably in issuing regulations implementing section 504 as that statute applies to public broadcasters. This delay is exacerbated by the government's shifts in rule making responsibility . . . seemingly to avoid determination of compliance guidelines for programming for the deaf. This action by the government is tantamount to intentional discrimination against the deaf.

The record supports this conclusion.

1. In October 1979, when HEW was the executive department responsible for coordinating section 504, it advised the District Court that a nationwide guideline regulation was "needed" (App. 59), and asked the District Court to permit it to prepare the regulation (App. 53-61). HEW stated:

> "The Department of HEW, in coordination with other federal departments and agencies that provide federal financial assistance to or regulate public television, is the appropriate body to establish a compliance standard under section 504 for public television.

* * * *

> The Secretary respectfully requests that the Court defer to the Department and the other federal agencies . . . and permit them to consider the unanswered complex questions that must be resolved before any standard of compliance can be formulated.
>
> * * * *
>
> [P]olicy in this area requires coordination. A number of federal agencies provide federal financial assistance.
>
> * * * *
>
> [T]he Department and the Office of Civil Rights have considerable experience in establishing compliance standards under section 504.
>
> * * * *
>
> [A] uniform national compliance is needed."

(App. 54, 56, 57, 59).

The District Court acquiesced in HEW's suggestion that it be given an opportunity to formulate a regulation and ordered HEW to promulgate the regulation by November 17, 1980 (App. 13).

2. When the Department of Education took over from HEW the responsibility for issuing the regulation, it asked the District Court to give it until May 6, 1981 to promulgate the regulation, representing that it could and would promulgate the regulation by that date (App. 22). The District Court ordered ED to promulgate the regulation by February 17, 1981 (App. 15).[9]

3. In August 1981, the Department of Justice assumed responsibility for issuing the regulation from ED. It then advised first the District Court (App. 25) and subsequently

---

[9]The majority in *Gottfried v. FCC*, *supra*, 655 F.2d at 312, was looking forward to the promised regulation to "resolve many of the uncertainties confronting the station, the Commission, and the court." *See also*, *Id.* at 317 n. 1.

this Court of its intention to publish the regulation.

The Solicitor General advised this Court:

> [T]he Department of Justice, the agency now responsible for coordinating implementation of section 504 is presently preparing regulation guidelines concerning what obligation section 504 imposes on broadcasters, and producers receiving Federal financial assistance. Those regulations, when promulgated, will help to insure uniform enforcement of section 504 by the funding agencies with respect to all public television stations.

Brief for FCC in *Gottfried*, p. 30.

The Solicitor General also advised the Court that 28 C.F.R. 41.6 provides for interagency cooperation in enforcing § 504 and regulations issued thereunder, and that conceivably FCC regulations could be considered with § 504 regulations. *Id.* at 48 n. 47. In his Reply Brief (p. 9, n. 6) the Solicitor General said the Department of Justice "is drafting the regulations" in consultation with other agencies "so that unified federal standards will emerge."

4. The Ninth Circuit has now held however that the executive department need not issue a section 504 regulation, and that the FCC need not issue a regulation under the Communications Act, or the Rehabilitation Act. This allows the government to continue a Catch-22 situation where broadcasters escape *ad hoc* consideration of discrimination against deaf people because there are no rules or standards by which to judge them.[10]

The unexplained failure of the executive department to keep its promise and issue the regulation after repeatedly

---

[10]Counsel for KCET advised this Court in *Gottfried* that a pleading saying that a station had only done X amount of programming for the deaf "would not run afoul of any stated policy, any standard, any guidelines that the FCC had laid down." Tr. of Argument, October 12, 1982, p. 14.

acknowledging that the regulation is necessary, is arbitrary and capricious. This Court and the courts of appeals have previously reversed agency actions that arbitrarily altered prior courses of action without "reasoned analysis." *See, e.g., Motor Vehicle Manufacturers Ass'n v. State Farm Mutual*, ___ U.S. ___, 103 S.Ct. 2856 (1983); *CBS v. FCC*, 454 F.2d 1018 (D.C.Cir. 1971). Indeed in his concurrence in *CBS*, Judge Tamm warned against the type of shifting of position which occurred in this case:

> The Commission cannot constantly change its position *quocumque modo velit*. I feel constrained to sound a trumpet in warning against such attempts by administrative agencies to play fast and loose with their opponents and the court. This court will not be made a party to the type of sham proceeding the FCC has attempted to create by its inconsistent changes in position.

454 F.2d at 1035-36.

II.

THE FCC HAS A DUTY UNDER THE REHABILITATION ACT, THE COMMUNICATIONS ACT, AND THE CONSTITUTION TO ISSUE A REGULATORY GUIDELINE DEFINING THE OBLIGATION OF ITS LICENSEES TO MAKE TELEVISION AVAILABLE AND UNDERSTANDABLE TO DEAF AND HEARING IMPAIRED PEOPLE.

A. The Rehabilitation Act.

The FCC grants "Federal financial assistance" as that term is defined in *Grove City College v. Bell*, ___ U.S. ___ (1984), and is therefore required to issue a section 504 regulation applicable to its licensees. In *Grove City College*, the Court rejected the claim that "Federal financial assistance" is limited to the receipt of funds directly from the federal government. Rather, the Court held it encompasses *all* forms of federal aid, direct or indirect. The Court found

nothing to suggest that Congress made the application of the non-discrimination principle contained in the law dependent on the manner in which a program or activity receives Federal financial assistance, stating:

> There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the federal government are subject to regulation. *Cf. Bob Jones University v. Johnson*, 396 F.Supp. 597, 601-604 (S.C. 1974), *aff'd* 529 F.2d 514 (4th Cir. 1975).

___ U.S. at ___. *See also, McGlotten v. Connolly*, 338 F.Supp. 448, 461 (D.C. Dist. 1972).

1. The District Court found that the FCC grants its broadcast licensees Federal financial assistance because it makes available assistance in the form of services of federal personnel, and renders a tremendous variety of services for which it should charge fees pursuant to 31 U.S.C. § 483(a) (App. 28-29). The District Court found:

> Because the FCC has donated its services for over four years, thereby subsidizing licensees, it has provided them federal financial assistance and is required to issue section 504 regulations. . . . Public broadcasters, as recipients of this subsidy, have obligations under section 504.

(App. 29).

The Ninth Circuit has not suggested that this finding is "clearly erroneous." *See, Pullman-Standard v. Swint, supra*, 456 U.S. at 293. Indeed, as the District Court found, the FCC itself recognizes that its failure to cover all reimbursable costs

> is tantamount to forcing taxpayers to subsidize those firms and their customers who are engaged in the production, sale and consumption of telecommunication services. Such subsidies may not be legal, necessary,

> equitable, economically efficient or in the public interest.

(App. 29).

The Commission is *still* not collecting any fees from its licensees.[11]

In *Gottfried*, the Court of Appeals for the District of Columbia did not consider whether assistance in the form of free services of federal personnel constitutes Federal financial assistance within the meaning of section 504. It did hold, *on the record before it*, that the grant of a license does not constitute Federal financial assistance, saying (655 F.2d at 315, n. 70):

> We hold only that broadcast licenses do not by themselves constitute "Federal financial assistance" within the meaning of section 504.[12]

---

[11]At a recent FCC oversight hearing the following colloquy took place between Representative Bates and the Chairman of the Commission:

> MR. BATES: Which brings me to the issue of costs, the costs of your operation, the costs of regulation . . . and I would specifically ask you what percentage of your costs of your operation are recouped by the fees and charges to those whom you regulate?
>
> MR. FOWLER: None. We have no fee schedule.
>
> MR. BATES: I think that is a deplorable situation. . . . Subcommittee on Telecommunications, Consumer Protection and Finance, 98th Cong. 2nd Sess. 1984, pp. 67-68.

[12]The court reached this conclusion by citing isolated and ambiguous language of individual members of Congress in the course of the legislative history surrounding the enactment of Title VI of the Civil Rights Act of 1964. The court pointed to Congressional hearings and floor debates in which speakers interpreted the words "Federal financial assistance" as applying to "funds" and "public monies out of the Federal Treasury." (655 F.2d at 313). Reliance on this legislative history is unwarranted. *See, Grove City College v. Bell, supra*, at ——, (Brennan, J., dissenting). Moreover, section 504 was enacted a decade after the enactment of Title VI, and by 1973 the federal agencies responsible for enforcing Title VI and courts had construed the term "Federal financial assistance" broadly. *See, McGlotten v. Connelly, supra*. It is presumed that Congress in enacting section 504 was aware of the expansive interpretation of Title VI. *See, Cannon v. University of Chicago*, 441 U.S. 677, 697, 698 (1979); *North Haven Board of Ed. v. Bell*, 456 U.S. 512, 535 (1979).

The question of whether the FCC grants Federal financial assistance to its broadcast licensees was not presented to this Court in *Gottfried*, and the Court did not purport to address the question definitively, although it did say, that the FCC is not a "funding agency." 103 S.Ct. at 892.

2. In the case at bar, the District Court found that a broadcast license is itself a valuable commodity, and that when the Commission grants a license, free of charge, the grant constitutes "Federal financial assistance" (App. 26-28). In *Gottfried*, the Court of Appeals acknowledged that "a license to broadcast on the public airwaves is a commodity of great value," and noted that as long ago as 1964 the average value of a VHF license probably exceeded $1,500,000.00. 655 F.2d at 315, n. 55. The court stated:

> That figure was based on calculations of the difference between the sale price of stations actually sold and the replacement cost of the stations' material facilities. Whatever the actual figure, there can be no doubt that the broadcast licenses . . . possess great value. *Id.*

The present value of a television license is reflected in the recent application filed by Metromedia Inc. involving the purchase of Metromedia Inc. for approximately $1,500,000,000.00. *See, In re Application of Metromedia Inc., supra*, FCC File No. BTCCT-840215 KG (Opposition of California Association of Physically Handicapped to Utilization of Short Form (316), etc.) The primary asset of Metromedia, Inc. is its broadcast licenses. As one commentator noted, the reality of broadcast ownership is that a licensee receives a valuable property which, "he may dispose of . . . and in fact, if not in law, sell the grant which the FCC gave him for nothing." Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, 41 J. & L. and Econ. 161, 165 (1965).

In light of *Grove City College*, petitioners submit that the FCC does grant Federal financial assistance to its broadcast licensees, and that it is therefore required to issue a section 504 regulation.

3. The FCC is also required to issue a section 504 regulation pursuant to the 1978 amendment of section 504. Prior to the 1978 amendment, only agencies granting Federal financial assistance were required to issue section 504 regulations. The 1978 amendment imposes this duty on all "executive agencies." The FCC is an "executive agency" (5 U.S.C. §§ 104, 105); *United States Government Manual 1983-1984*, p. 491, and *must* issue a section 504 regulation. *Williams v. United States*, 704 F.2d 1162 (9th Cir. 1983).

The question is whether the programs or activities of the FCC include regulating broadcast licensees (*see, Consolidated Rail Corporation v. Darrone, supra* at ___; *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982); *Grove City College v. Bell, supra*), thus requiring the Commission to issue a regulation compelling its licensees to comply with section 504.

Petitioners submit that the primary "activity" of the FCC is regulating its broadcast licensees. *See, United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968).

In *CBS, Inc. v. FCC*, 453 U.S. 367, 394 (1981), the Court emphasized that a broadcast licensee holds a license in trust and the Commission acts as an "overseer" and ultimate arbiter and guardian of the public interest. The Commission polices its licensees to ensure that they meet their public interest obligations through an elaborate statutory scheme governing virtually all apsects of the broadcast industry. Indeed the Commission's revew and guidance of broadcasting conduct is "automatic, continuing and pervasive." *Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com.*, 412 U.S. 94, 178 (1973) (Brennan, J. dissenting).

B. The Communications Act.

The District Court found that the FCC is required to issue a regulation under the Communications Act (App. 25-26, 29-31). Essentially the District Court followed the views of the Court of Appeals for the District of Columbia in *Gottfried v. FCC, supra*. That court stated (655 F.2d at 315-16):

> Because of the national policy of extending increased opportunities to the hearing impaired, we believe that some accommodations for the hard of hearing are required of commercial stations, under the general obligation of licensees to serve "the public interest, convenience, and necessity. . . ."
>
> In its brief to this court the Commission rehearses a series of efforts that it has encouraged and licensed from 1970 to the present. It represents that it is moving forward in this area, and that it will continue to do so. Recognizing that the Commission prosesses special competence in weighing the factors of technological feasibility and economic viability that the concept of the public interest must embrace, we defer today to its judgment. However, should the Commission fail to fulfill its obligation to the nation's hearing impaired minority, as we have indicated, judicial action might become appropriate at a later date.

In this respect this Court did not disagree with the Court of Appeals. *See*, 103 S.Ct. at 893.

C. The Constitution.

The "public interest" in increasing access to television programming, which the Commission must encourage, is an interest that is consistent with the First Amendment policy of providing the fullest possible access to information through the public airways. *Sony Corporation v. Universal City Studios*, ___ U.S. ___, ___, 104 S.Ct. 774, 780 (1984).

Fifteen years ago, Justice White stated in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969):

> It is the right of the viewers and listeners, not the right of broadcasters, which is paramount. . . . it is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

In the case at bar, the District Court concluded that hearing impaired people were denied access to public television and were denied information necessary to participate in our democracy as informed citizens, in violation of the First Amendment (App. 34-36).

The District Court also concluded that petitioners were arbitrarily denied privileges of citizenship, in violation of the Fifth Amendment (App. 33-36). Access to programs broadcast over the public airways, by public trustees, is a privilege of citizenship guaranteed by the Constitution. *See, Slaughter-House* cases, 83 U.S. (16 Wall.) 36, 78 (1873).

Finally, the District Court held that the federal government in failing to issue the required regulation has deliberately fostered and promoted discrimination against petitioners, denying them due process of law and equal protection of the law (App. 33-36).

See, Norwood v. Harrison, 413 U.S. 455 (1972).

In summary, the Commission has a statutory and constitutional duty, which it has not met, to issue a regulation to advance the national policy found in the Rehabilitation Act of 1973, as amended.

III.

THE NINTH CIRCUIT ERRED BY HOLDING THAT SOUTHEASTERN COMMUNITY COLLEGE v. DAVIS, RELIEVED PUBLIC TELEVISION STATION KCET OF ITS OBLIGATION UNDER SECTION 504 FROM TAKING POSITIVE STEPS TO ENABLE ITS HEARING IMPAIRED VIEWERS TO BENEFIT FROM TELEVISION PROGRAMS DIRECTLY FUNDED BY THE FEDERAL GOVERNMENT.

A. The Ninth Circuit erred in holding that *Southeastern Community College v. Davis, supra*, relieved KCET of its obligation under section 504 from taking positive steps to enable deaf persons to benefit from its television programs. When KCET advanced this argument in the District Court, HEW voiced its disagreement, stating that *Davis* supports no such assertion (App. 61-66). In ignoring HEW's views, the Ninth Circuit ignored *Davis* (442 U.S. at 412-413):

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. . . . Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.

The Ninth Circuit mistakenly stated that the District Court held that KCET did not violate section 504. The District Court explicitly rejected this conclusion, holding only that petitioners had failed to prove such discrimination (App. 40). The District Court did hold that as a result of the government's failure to promulgate a section 504 regulation, petitioners, "qualified handicapped persons," have, on the basis of handicap, been excluded from participation in, have been denied the benefits of, and have otherwise been subjected to discrimination under programs or activities which receive or benefit from Federal financial assistance." (App. 33).

B. Contrary to the teachings of *Grove City College* the Ninth Circuit held that section 504 does not apply to the full range of KCET's "programs and activities" (App. 11), although the station receives massive, direct, unrestricted federal grants. During its 1977 fiscal year for example, KCET received $2,363,927.00 — more than 18% of its total revenue — from the Corporation for Public Broadcasting (*Gottfried v. FCC, supra*, 655 F.2d at 306, n. 39). KCET is one of the largest public television stations in the country, and produces a large number of programs with funds received from the government.

All that the Ninth Circuit required of KCET, to comply with section 504, is that it broadcast captioned programs which are made available to it in captioned form by the Department of Education (App. 11). The decision leaves KCET free to ignore section 504 when, for example, it produces a television program with federal funds and broadcasts it without captions. Yet, in its submission to the District Court, HEW expressed the view that the full range of KCET's activities is covered by section 504 (*supra*, 5).

While this Court has not yet settled the meaning of the terms "program or activity" as used in section 504 (*see, Consolidated Rail Corporation v. Darrone, supra*, the Court's decisions in *Grove City College* and *North Haven Board of Education v. Bell*, are plainly authoritative guides. *Grove City College* holds that the receipt of direct non earmarked grants to institutions "increases both an institution's resources and its obligations." ___ U.S. at ___, ___. Petitioners submit that under *Grove City College*, the full range of KCET's "programs and activities" is covered by the statute, because of the massive direct unrestricted grants it receives.

Conclusion.

For the aforesaid reasons the requested petition for writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM GOTTFRIED,
Professional Corporation,

STANLEY FLEISHMAN,
A Professional Corporation,

CHARLES M. FIRESTONE,
Communications Law Program,
UCLA School of Law,*

By STANLEY FLEISHMAN,
Counsel of Record.

Of Counsel

RODNEY R. JONES,

PAUL L. HOFFMAN,
LAW INSTITUTE FOR THE
DISABLED AND ELDERLY,
Southwestern University,
School of Law,*

SAMUEL ROSENWEIN,

*Counsel acknowledges the research assistance of Ken Anderson, Jean LeGrand, Nona Williams, Ellen Lewenstein, Andrew Treusch, Henry Weinblatt and Melinda Hayes.

APPENDIX A.

Opinion.

United States Court of Appeals for the Ninth Circuit.

Greater Los Angeles Council on Deafness, Inc., a California non-profit corporation, et al., Plaintiffs-Appellees-Cross-Appellants, v. Community Television of Southern California, et al., Defendants-Appellants, and Department of Education, et al., Defendants-Appellants-Cross-Appellees. Nos. 80-5400, 80-5445, 80-6064, 80-6066, 81-5952, 82-5054, 82-5280. D.C. No. CV 78-4715-R.

Filed: November 2, 1983.

Appeal from the United States District Court for the Central District of California. The Honorable Manuel Real, Presiding. Argued and Submitted November 4, 1982.

Before: GOODWIN, HUG, and BOOCHEVER, Circuit Judges.

HUG, Circuit Judge:

This case requires us to consider the rights of hearing impaired television viewers under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.[1] The plaintiffs, class of hearing impaired persons, argue the Act requires television stations that receive federal funding to provide open captioning of programs. When a program is open captioned,

---

[1]Section 504, 29 U.S.C. § 794, provides in part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 706(7)(B) defines "handicapped individual" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."

subtitles appearing at the bottom of the television screen translate the audio portion of the program. Defendants, the federal agencies that fund television programming and the private companies that produce and broadcast it, contend that any requirements imposed on them by the Rehabilitation Act can be satisfied by the use of closed captioning. A closed captioning system requires use of a decoder, which allows only viewers with special equipment to view the audio translation.[2]

The district court held that the federal defendants were required to promulgate regulations mandating standards of compliance by public broadcasting stations with Section 504 of the Rehabilitation Act of 1973. We hold that it is within the appropriate agency's discretion to determine whether to promulgate regulations or to implement the Rehabilitation Act through adjudication and conditioning its grants of funds. We therefore reverse the judgment against the federal defendants.

The district court also held that the private companies that produce and broadcast the federally funded programs did not violate the Rehabilitation Act. The Act does not mandate the production and broadcasting of federally funded programs with open rather than closed captions. We therefore affirm this portion of the judgment.

I

Procedural History

This action was brought by the Greater Los Angeles Council on Deafness, Inc.[3] and by two individual plaintiffs, Marcella Meyer and Sue Gottfried. The suit was certified

---

[2]Decoding equipment must be purchased by the hearing impaired viewer and attached to the individual television set. The approximate cost of the decoder is $250.

The cost of producing closed or open captioned programs is equal. Stations broadcasting open caption programs incur additional equipment expense.

[3]The Greater Los Angeles Council on Deafness, Inc. was dismissed for lack of standing. That order has not been appealed.

as a class action on behalf of all hearing impaired persons within Los Angeles, Orange, Ventura, and Santa Barbara Counties. The complaint named two groups of defendants. The first, the "private defendants," included television station KCET, its officers, the Corporation for Public Broadcasting ("CPB"), and the Public Broadcasting System ("PBS").[4] The plaintiffs alleged that KCET, a recipient of federal funds, had violated section 504 by failing to provide open captioning of all programs broadcast by the station. CPB and PBS were also alleged to have violated section 504 by distributing federally financed programs to KCET despite its failure to provide open captioning. The complaint sought to enjoin KCET's broadcast of non-captioned programs and CPB and PBS's distribution of funds and programs to all stations broadcasting such programs. Plaintiffs also requested compensatory and punitive damages.

The second group of defendants, the "federal defendants," originally included the Federal Communications Commission ("FCC") and the Department of Health, Education, and Welfare ("HEW"). When the latter agency was restructured in 1980, the Department of Education and the Attorney General were added to the federal defendants. It was alleged the FCC had failed to issue regulations requiring public broadcasting stations to comply with section 504 and that HEW (and later Education) had distributed funds to grant recipients who violated section 504. The Attorney General was alleged to have failed to enforce the non-discrimination provisions of section 504. The plaintiffs

---

[4]CPB is a non-profit corporation that facilitates development of public broadcasting by making grants for local station operations, program production and distribution, and advertising.

PBS, a non-profit membership corporation, is a distributor to local stations of national public television programs.

An additional private defendant, the California Public Broadcasting Commission, was dismissed and is not a party to this appeal.

sought promulgation of appropriate regulations, termination of funding to grantees not complying with section 504, and recovery of funds previously distributed to non-complying stations.

The case came to trial in February 1980. After the plaintiffs presented their case, all defendants moved for dismissal of the action under Fed. R. Civ. P. 41(b). In an alternate motion, HEW agreed that section 504 applied to public broadcasters who are recipients of federal funds, and requested that the district court remand the case to HEW for development of a standard of compliance with section 504. Without ruling on the dismissal motions, the district court remanded to HEW. It ordered the Department to "develop, prepare and promulgate with all speed possible . . . a compliance standard that sets forth the obligations under section 504 of public broadcasters that receive federal financial assistance."

HEW had begun exploring the use of captioning by public broadcasters prior to the passage of the Rehabilitation Act in 1973. It contracted for a study of the acceptability of captioning programs, and inferred from the study that captioned television would be feasible only if some means were developed to display captions only on the sets of hearing impaired persons, without interfering with the reception of the hearing audience. Because it seemed likely that public broadcasting stations employing open captions would lose viewers to private stations, HEW decided to work towards development of a closed captioning process. Grants were issued and contracts entered into for the development and manufacture of such a system. HEW then inserted in its film production contracts the condition that all federally funded programs be closed captioned, and began closed captioning of programs in its film library. These developments paralleled the early stages of this litigation, and shortly

after the district court remanded the case to HEW, the closed caption system developed by the agency began operating.

The task of promulgating regulations under the remand order fell to the newly organized Department of Education. After requesting and receiving two stays of the order, the Department published a notice of intent to promulgate regulations and, at a subsequent status conference, advised the court of its progress on the new rules. However, in August 1981, the Department advised the court that under its interpretation of section 504, KCET had complied by transmitting with closed captions those programs the Department required to be produced with such captions. It further advised the court it had abandoned its rulemaking efforts, and would proceed instead by adjudication and imposition of contract conditions.[5] The court then ordered resumption of trial to determine if the Department's new position satisfied its responsibilities under the Rehabilitation Act.

Prior to trial the private defendants renewed their Rule 41(b) motions for dismissal. These were granted, the court concluding that section 504 did not require KCET, CPB, and PBS to take affirmative action to provide access to television programing, and that therefore no violation of the section had been proven.

Following presentation of the federal defendants' case, the court entered judgment for the plaintiff class against the federal defendants. The court concluded that, because of the Government's failure to promulgate regulations implementing section 504, hearing impaired viewers had been

---

[5]In a separate administrative adjudication, the Department had imposed on KCET the requirement that it broadcast with closed captions all programs received from the Department that were captioned. It concluded KCET was not required to add closed captions to programs produced without them, since that would impose an unreasonable financial burden on the station.

subjected to discrimination and denied the benefit of federally funded programs. This was held to violate both the Rehabilitation Act and the Constitution. The court also concluded that closed captioning was not a reasonable means of assuring non-discriminatory access to television programs, thus implying that only open captioning would comply with the Rehabilitation Act. The court enjoined the Department of Education from granting or disbursing any federal funds for the production or broadcasting of television programs until it promulgated relations consistent with the court's conclusions. It exempted from the injunction the disbursement of funds for projects developing or employing an open captioning system. The judgment also required the FCC and the Attorney General to promulgate section 504 compliance standards. The plaintiffs were awarded costs and attoneys' fees.

The federal defendants appeal, challenging the requirement that they promulgate regulations and terminate funding.[6] The class representatives cross-appeal the judgment dismissing the private defendants. The private defendants filed a protective appeal to challenge their loss of funding under the judgment. All parties' appeals were consolidated for our review. In addition, eight associations advocating the rights of handicapped and hearing impaired persons filed an *amicus curiae* brief.

II

Exhaustion of Remedies

Plaintiffs had administrative proceedings pending before both the FCC and HEW when they initiated this action in district court. The private defendants argue that the district

---

[6]The federal defendants challenge the award of costs and attorneys' fees in a separate appeal that has been referred to another panel of this court. The resolution of that claim awaits the outcome of this appeal.

court erred in granting the plaintiffs relief prior to the exhaustion of those administrative remedies. The Supreme Court has held that exhaustion of administrative remedies provided by Title IX of the Education Amendments of 1972 is not required prior to filing a private court action. *Cannon v. University of Chicago*, 441 U.S. 677, 706 n.41 (1979). The administrative procedures under section 504 are the same as those under Title IX. 29 U.S.C. § 794(a)(2). Accordingly, we have held that section 504 remedies are inadequate and that exhaustion is not required. *Kling v. County of Los Angeles*, 633 F.2d 876, 879 (9th Cir. 1980). Plaintiffs did not, therefore, improperly bring this action even though administrative actions were pending. The resulting redundancy of proceedings was untidy, and wasteful of judicial resources, but did not require dismissal.

III

Termination of Funding

The district court ordered the Department of Education to terminate funding of television programs pending promulgation of regulations. We find nothing in the structure of the Rehabilitation Act that authorizes court-mandated termination of funds upon the request of a private plaintiff. Withholding of funds is a "severe" remedy that an agency can invoke "to avoid the use of federal resources to support discriminatory practices." *Cannon*, 441 U.S. at 704-05. The agency is required to follow specific statutory procedures, and is permitted to terminate funding only after making an express finding that a particular recipient has failed to comply with a funding requirement. 42 U.S.C. § 2000d-1; *see* 29 U.S.C. § 794(a)(2). No such finding was possible in this case. Moreover, nothing in the statute suggests a private plaintiff may avail herself of this remedy. *See Can-*

non, 441 U.S. at 704-06 (contrasting public and private remedies). The district court thus erred in ordering HEW to terminate funding pending promulgation of regulations.

IV

Promulgation of Regulations

a. *Attorney General*

The Office of the Attorney General is responsible for coordination of implementation and enforcement of the nondiscrimination provisions of section 504. Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1. This responsibility entails the review of proposed regulations, but not their promulgation. 28 C.F.R. § 41.4 (1981); *see also Community Television v. Gottfried*, 51 U.S.L.W. 4134, 4137 (U.S. Feb. 22, 1983) (responsibility for enforcing section 504 lies with agencies administering federal financial assistance programs). The district court thus erred in ordering the Attorney General to promulgate regulations.

b. *FCC*

The district court's order requiring the FCC to promulgate regulations is inconsistent with the Supreme Court's decision in *Community Television*. The Court held that because the FCC is not charged with administering funds under section 504, it has no responsibility for enforcement and no duty to promulgate regulations. *See* 51 U.S.L.W. at 4137. The judgment as to the FCC was therefore granted in error.

c. *Department of Education*

The Department argued before the district court that it could properly interpret and enforce section 504 through two alternatives to promulgation of regulations: (1) adjudication of complaints against funding recipients, and (2) conditioning of grant awards on compliance. The plaintiffs

contended, and the court apparently concluded, that the Government was estopped from abandoning its rulemaking efforts since the litigation had been delayed on the Government's representation that regulations were being prepared. However, the Government preserved its claim that it need not issue regulations at all stages of the proceedings below. It specifically appealed the two orders of the trial court that it issue regulations, and in each case obtained a stay. Moreover, an estoppel theory generally cannot be asserted against the Government. *See, e.g., Schweiker v. Hansen*, 450 U.S. 785 (1981). We therefore conclude the Government was not barred from abandoning its efforts to promulgate rules, and we consider the merits of this issue.

The district court erred in ordering the Department of Education to proceed by rulemaking. The decision whether to proceed by adjudication or rulemaking "lies in the first instance within the [agency's] discretion." *NLRB v. Bell Aero-Space Co.*, 416 U.S. 267, 294 (1974); *see Montgomery Ward & Co., Inc. v. F.T.C.*, 691 F.2d 1322, 1328 (9th Cir. 1982). In some instances proceeding through rulemaking may be "better, fairer, and more effective," *Community Television*, 51 U.S.L.W. at 4137, because it provides clear notice to those regulated. *See, e.g., Montgomery Ward*, 691 F.2d at 1332; *Patel v. INS*, 638 F.2d 1199, 1204 (9th Cir. 1980). However, no such circumstance is presented by this case because the plaintiffs are not regulated parties. We hold the decision not to promulgate rules at this time was not an abuse of discretion.

In *Community Television*, the Court considered federal agencies' enforcement power under section 504. It suggested that enforcement could be achieved by attaching conditions to the stations' federal grants, "[o]r regulations *may* be promulgated under the Rehabilitation Act that impose special obligations on the subsidized licensee." 51 U.S.L.W.

at 4137 (emphasis added). Contrary to the plaintiffs' assertion, *Community Television* contains no suggestion that the Government must proceed by rulemaking.

From a practical standpoint, the decision not to proceed by rulemaking will permit the Government to remain responsive to the developing technology in this area. Use of adjudication and contract conditions allows the Government to work with producers and broadcasters in developing programs that are accessible to hearing impaired viewers. The Department has taken the lead in developing this technology and has developed expertise to which we must defer. We thus cannot say that the Department is not entitled to implement whatever enforcement duties it has in this area by methods other than rulemaking. On the record before us, and in light of the strong policy of separation of powers and the broad discretion granted the executive agency, we hold that the trial court erred in requiring the Department of Education to promulgate rules.

V

Dismissal of Private Defendants

The Supreme Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) interpreted compliance standards under section 504. In determining what compliance with section 504 entailed, the Court took as its starting point this statutory language: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." It concluded that, by its own terms, section 504 does not require a federal fund recipient to make substantial modifications in, or to alter the nature of, regular programs to allow disabled persons to participate. *Id.* at

405. The Act mandates "evenhanded treatment of qualified handicapped persons." *Id.* at 410. It does not "impose an affirmative action obligation on all recipients of federal funds." *Id.* at 411.

Television broadcasting and production by its nature is composed of visible and audible components. The loss of hearing on the part of viewers impairs their ability to receive and enjoy the audio component. Some sort of affirmative modification of normal television broadcasting is required in order to compensate for the deaf and hearing impaired viewers' inability to receive the audio portion. In applying the *Davis* analysis to this situation, the district court has correctly concluded that the private defendants did not violate section 504 by failing to take affirmative action to caption or sign all of the programs broadcast.

We do not disagree with plaintiffs and *amici* that the development of captioning systems is of great benefit to the hearing impaired viewers and that making television more available to the deaf and hearing impaired is a highly desirable social objective. The activities and expenditures of the Department of Education and its precedessor HEW in developing the closed caption system and in requiring that all programs it funds be produced with closed captions is clear governmental recognition of this desirable objective. The Department of Education has further required as a condition of its grants that the public broadcasting stations, such as KCET, broadcast with closed captions those programs produced with closed captions. The district court, in dismissing the private defendants, correctly determined that KCET, CPB, and PBS are not compelled by section 504 to take further affirmative action to compensate for the inability of the hearing impaired viewers to receive the audio portion of the broadcast.

VI

Constitutional Claims

The plaintiffs' constitutional claims are not well articulated. They apparently contend the first and fifth amendments impose on the federal defendants a duty of affirmative action to make television accessible to the hearing impaired. The district court's conclusion that such a constitutional obligation exists finds no support in any existing legal precedent.

The judgment dismissing the private defendants is AFFIRMED, and the judgment against the federal defendants is REVERSED. Each party shall bear its own costs on appeal.

APPENDIX B.

Order of Remand.

United States District Court, Central District of California.

Greater Los Angeles Council on Deafness, Inc., et al., Plaintiffs, vs. Community Television of Southern California d/b/a KCET, et al., Defendants. CV 78-4715-R.

Filed: March 20, 1980.

The above-entitled action came on for trial Wednesday, February 13, 1980, and continued on February 14, 1980. After presenting their case, plaintiffs rested, and each of the defendants moved for dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

IT IS HEREBY ORDERED that:

1. All proceedings in this matter are continued until November 17, 1980 at 10:00 a.m. for further proceedings in the nature of a status conference and setting of further trial if necessary.

2. The defendant, Secretary of the Department of Health, Education, and Welfare, Patricia Roberts Harris, having determined that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, is applicable to public television stations that receive federal financial assistance, and the Department of Health, Education and Welfare having the facilities and expertise to develop an appropriate compliance standard, the matter of a compliance standard is remanded to the Department of Health, Education and Welfare.

3. The Department of Health, Education and Welfare shall develop, prepare and promulgate with all speed possible, but no later than November 17, 1980, a compliance standard that sets forth the obligations under Section of 504 of public broadcasters that receive federal financial assis-

tance. A report of the compliance standard promulgated shall be made to the Court on November 17, 1980.

DATED: March 20, 1980.

/s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX C.

Order.

United States District Court, Central District of California.

Greater Los Angeles Council on Deafness, Inc., et al., Plaintiffs, v. Community Television of Southern California d/b/a KCET, et al., Defendants. Civil No. CV-78-4715 R.

Filed: December 18, 1980.

The Department of Education's Motion to Modify the Order of March 20, 1980 is granted in part and denied in part. The Department's request for additional time is granted, but the request to extend the deadline for promulgation of the final regulation to May 15, 1981 is denied.

IT IS ORDERED that paragraph 3 of the March 20, 1980 Order is modified to read as follows:

> "3. The Department of Education shall develop, prepare and promulgate a compliance standard that sets forth the obligation under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, as amended, of public broadcasters that receive federal financial assistance. The Department shall promulgate the compliance standard according to the following schedule:
>
> a) The Department shall publish a Notice of Proposed Rule Making (NPRM) setting forth the compliance standard by December 15, 1980;
>
> b) The comment period with respect to the NPRM shall close on January 26, 1981; and
>
> c) The Department shall promulgate the final regulation containing the standard by February 17, 1981."

IT IS FURTHER ORDERED that a status conference shall be held in this case on April 6, 1981.

Date: Dec. 18, 1980.

[Stamp] Manuel L. Real
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX D.

Judgment.

United States District Court, Central District of California.

Greater Los Angeles Council on Deafness, Inc., etc., et al., Plaintiffs, vs. Community Television of Southern California, dba KCET, et al., Defendants. No. 78-4715 R.

REVISED

Filed: November 23, 1981.

The Court having made and entered its Findings of Fact and Conclusions of Law herein now orders:

1. Except as otherwise provided herein, the federal defendants who are empowered to grant federal financial assistance, and/or who are charged with the responsibility of making grants and/or contracts with reference to television programs that will be shown on any television station are enjoined from:

(a) granting any federal financial assistance or disbursing any monies for the preparation of television programs, or

(b) granting any federal financial assistance or disbursing any monies to any television station for the purpose of airing programs that have been made with federal financial assistance

until the federal defendants granting such federal financial assistance or disbursing any such monies have provided by regulation or contract for full compliance with section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, with respect to such grant of federal financial assistance or disbursement.

2. This order shall not preclude the Department of Education ("ED") from granting federal financial assistance or disbursing monies for open captioning of programs such as the ABC Evening News.

3. This order shall not preclude ED from granting federal financial assistance or disbursing monies to the National Captioning Institute, Inc. (NCI) for:

(a) operating subsidies or special project grants related to the development of (1) captioning technology, or (2) the viability of a captioning system providing the hearing impaired with access to commercial television, or

(b) captioning of the Library of Department-Assisted Programs produced before the policy requiring closed captioning was established.

4. This order shall not preclude the federal defendants from making grants of federal financial assistance or disbursing monies for the production of programs intended for purposes other than broadcast.

5. This order shall not preclude the federal defendants from making grants of federal financial assistance or disbursing monies for television related functions not involving production of programs.

6. The Attorney General and the Federal Communications Commission shall forthwith adopt and promulgate regulations setting forth the standards of compliance by public broadcasting stations with section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794).

7. The Court retains jurisdiction pending the satisfactory promulgation of regulations as herein provided.

8. The defendants shall pay directly to Abraham Gottfried Professional Corporation, attorney for plaintiffs, reasonable attorney's fees and costs in accordance with section 505(a) and (b) of the Rehabilitation Act of 1973 (29 U.S.C. § 794a and (b); 28 U.S.C. § 2412(d)(1)(A); Equal Access

to Justice Act, Pub.L. 96-481, § 204(a), 94 Stat. 2327 (1980); 5 U.S.C. § 504(b)(1)(A).

DATED: NOV 23 1981.

[stamp] MANUEL L. REAL
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

ABRAHAM GOTTFRIED
PROFESSIONAL CORPORATION
By /s/ Abraham Gottfried
ABRAHAM GOTTFRIED
Attorney for Plaintiffs

ANNE BUXTON SOBOL
Attorney for Federal Defendants

APPENDIX E.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Greater Los Angeles Council on Deafness, Inc., etc., et al., Plaintiffs, vs. Community Television of Southern California, dba KCET, et al., Defendants. No. CV 78-4715 R.

[AFTER TRIAL]

Filed: November 17, 1981.

Pursuant to Rule 52(b) of the Federal Rules of Civil Procedure and after trial of this case, the court makes the following findings of fact and conclusions of law in the above entitled matter.

FINDINGS OF FACT

PARTIES

1. The original plaintiffs consisted of Greater Los Angeles Council on Deafness, Inc., a California non-profit corporation, Marcella M. Meyer and Sue Gottfried, for themselves and in behalf of all others similarly situated. The original defendants consisted of Community Television of Southern California, doing business as KCET, James L. Loper, William J. Lamb, Federal Communications Commission, Corporation for Public Broadcasting, Public Broadcasting Service, California Public Broadcasting Commission, United States Department of Health, Education and Welfare and its Secretary.

2. Prior to trial, Greater Los Angeles Council on Deafness, Inc., a California non-profit corporation, was dismissed, as not having standing to sue.

3. After plaintiffs put on their case, the following defendants were dismissed from the action: Community Television of Southern California, doing business as KCET,

James L. Loper, William J. Lamb, Corporation for Public Broadcasting, Public Broadcasting Service, California Public Broadcasting Commission.

4. Prior to the federal defendants putting on their case, the following defendants were added as parties: Department of Justice, and Health and Human Services (HHS).

5. The action has been certified as a class action.

SECTION 504
AND ITS IMPLEMENTING REGULATION

6. Section 504 was enacted September 26, 1973 and provides as follows:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.*"[1]

7. On April 28, 1976, President Ford issued Executive Order No. 11914 instructing HEW to implement section 504 and to coordinate the implementation of section 504 by

---

[1]The underlined words were added by the 1978 Amendment to section 504.

all federal departments and agencies empowered to extend federal financial assistance to any program or activity.

8. On May 4, 1977, the Secretary of HEW issued a regulation implementing section 504 (45 C.F.R. Part 84). The regulation set forth prohibited discriminatory practices against handicapped persons, and provided for program access. Although the regulation applied specifically to recipients of federal financial assistance from HEW, the regulation stated that it would be used as a guideline for other agencies required to issue section 504 regulations.

9. Pursuant to Executive Order No. 11914, the Secretary of HEW issued a regulation, on January 13, 1978, "to coordinate governmentwide enforcement of section 504." (45 C.F.R. Part 84). The regulation provides, *inter alia*, that each agency "shall issue a notice of proposed rulemaking no later than ninety (90) days after the effective date of this Part [January 13, 1978]", and "shall issue a final regulation no later than 135 days after the end of the period for comment on its proposed regulation." (45 C.F.R. Part 85.4(b)). This regulation also set forth prohibited discriminatory action against qualified handicapped persons, and provided for program access.

10. After HEW promulgated final guidelines and standards implementing Executive Order 11914, Congress amended section 504 in November 1978 to extend its nondiscrimination provisions to programs and activities conducted by Executive agencies and the United States Postal Service. The head of each Executive agency and the United States Postal Service was instructed to "promulgate such regulations as may be necessary to carry out the amendments" to section 504.

11. HEW began to develop a compliance guideline for public broadcasters in October 1979, but it had not com-

pleted the task prior to its split into separate departments of Health and Human Services and of Education in May 1980. *Gottfried v. FCC*, Slip opinion 17. At the time HEW was the agency responsible for section 504 — and thus at a time when its construction would have been due "substantial deference" from a reviewing court — HEW determined that section 504 applies to public broadcasting stations. *Gottfried v. FCC*, Slip Opinion 17.

12. On March 20, 1980, this court ordered HEW to issue a regulation by November 17, 1980 to assure that public broadcasting stations complied with section 504.

13. On May 4, 1980, the Department of Education was established and it assumed from HEW the responsibility for implementing and enforcing section 504. The HEW study group that was involved in preparation of section 504 compliance guidelines for public television was transferred to the Department of Eduction. *Gottfried v. FCC*, Slip Opinion 9, n.22. The Department of Education adopted the HEW guidelines and redesignated them as 28 C.F.R. part 41 (46 Fed.Reg. 40686).

14. By Executive Order No. 12250, dated November 2, 1980, responsibility for coordinating the implementation of section 504 was transferred to the Attorney General (45 Fed.Reg. 72995), but the general guidelines previously issued by HEW were retained.

15. On November 24, 1980, the Department of Education (ED) represented to this court that it had assumed responsibility for developing a compliance guideline for public broadcasters, but that it would be unable to meet the deadline previously set by the court for the promulgation of such a regulation. ED represented that it could and would issue such a regulation, in accordance with this court's order, by May 6, 1981.

16. On January 19, 1981, the Department of Education filed in the Federal Register a Notice of Intent to Develop Regulations applying section 504 to the activities of public broadcasters. (46 Fed.Reg. 4954). The notice was prepared, at least in part, to respond to the complaint filed in this action. The notice posed the following nine questions.

A. Should the Department pursue its intention to issue detailed regulations on the section 504 obligation of television broadcasters and systems of broadcasters? Are there other means of defining and insuring compliance with these obligations?

B. What is the nature and extent of the benefit derived by broadcasters from the availability of television programs produced with Department of Education funds?

C. What is the nature and extent of the benefit derived by systems of broadcasters such as the Public Broadcasting Service (PBS) and regional networks, from the availability of these programs?

D. Which activities carried out by broadcasters and systems of broadcasters are subject to the requirements of section 504 by virtue of the benefits referred to above? For example, would broadcasters and systems of broadcasters be required to make some or all programs that they broadcast or distribute accessible to persons with impaired hearing by reason of the availability of programs produced with Department funds? By what regulatory standards should any obligation to make programs accessible be determined?

E. What difference, if any, should there be in the Department's treatment of commercial and noncommercial broadcasters and systems of broadcasters? Why?

F. What are the advantages and disadvantages of using the various available methods of making television programs accessible to persons with impaired hearing? Currently

available methods include open caption, close captioned, and sign language interpreting. Commentors are invited to consider, with regard to these and other possible methods, such factors as the effectiveness in making programs accessible to the greatest possible number of hearing impaired persons, the degree to which the method adversely effects the video portions of the program, cost, availability of resources, such as captioning capacity or qualified interpreters, and anticipated technological developments. Are particular methods better suited for some programs than others?

G. Should the Department limit the methods which may be used? If so, which method or methods should the Department select, and why?

H. Should the Department differentiate between various types of programs in setting standards for program accessibility? Examples of such programs include: live programs, programs broadcast shortly after being recorded, programs intended only for local use, and programs recorded before a certain date. If so, what should be the basis for distinctions? Commentors are invited to consider such factors as technological feasibility, cost, availability of resources to provide access, and size of potential audience.

I. How soon after publication should any requirement for program accessibility take effect?

17. After issuing its notice, the Department of Education decided *not to develop* a general rule, applying section 504 to the activities of public broadcasters.

18. After the Attorney General assumed responsibility for coordinating implementation and enforcement of section 504 on November 2, 1980, nothing was done until July 1981, when the Deputy Assistant Attorney General for Civil Rights made inquiry as to the status of the regulation setting forth the obligation of public broadcasters pursuant to sec-

tion 504. The Deputy Assistant Attorney General for Civil Rights is currently planning to include a provision pertaining to the obligation of public television entities to the hearing impaired in a revised section 504 regulation. The Deputy Assistant Attorney General hopes to have a final regulation by June 1982. The Office of Management and Budget, however, has expressed the view that the Deputy Assistant Attorney General's date is optimistic.

19. Federal executive departments and agencies, as well as the Corporation for Public Broadcasting grant noncommercial educational television stations, public broadcasters, financial assistance. *Gottfried v. FCC*, Slip Opinion 13-14, n. 36.

THE COMMUNICATIONS ACT AND THE FEDERAL COMMUNICATIONS COMMISSION

20. The Communications Act of 1934 charge the Federal Communications Commission (FCC) with granting broadcast licenses and license renewals (47 U.S.C. §§ 307-309). The Commission does so pursuant to a general mandate to protect and advance "the public interest, convenience and necessity." (47 U.S.C. §§307(d), 309(a), 309(d)). Although this mandate is general, the Commission has in fact interpreted it through the issuance of a number of regulations and guidelines. Even before section 504 was enacted, the Commission recognized the appropriateness, and need, of making television accessible to the hearing impaired, more than a decade ago. (See, *Deaf Viewers — Use of TV to Inform*, 26 FCC 2d 917, 919 (1970)). The Commission there expressed concern about needs of the hearing impaired and noted that if stations do not voluntarily provide better service "it may be necessary to begin rulemaking looking toward the option of minimum requirements." *Gottfried v. FCC*, Slip Opinion 35, n 70.

21. Both the courts and the FCC have construed the "public interest" standard for license award to include a requirement that broadcasters endeavor to discover and meet the programming needs of all significant groups within their areas of service. *Gottfried v. FCC*, Slip Opinion 6.

22. At least since 1970, the Commission has urged licensees to make efforts to serve the hearing impaired, a group estimated to include at least 13 million people, nationwide. *Gottfried v. FCC*, Slip Opinion 6.

23. The Commission has declined to include the hearing impaired among the groups whose needs must specifically be consulted. *Gottfried v. FCC*, Slip Opinion 6-7.

24. The Commission has never promulgated guidelines requiring entertainment programming, or other programming, for the hearing impaired. *Gottfried v. FCC*, Slip Opinion 7.

25. The Commission has emphasized in its public pronouncements that licensees can and will be responsive to the needs of the hearing impaired viewers, but has left the responsibility of how it can most effectively meet those needs to each licensee. *Gottfried v. FCC*, Slip Opinion 8-9.

26. Although the Commission has recognized that section 504 may impose a statutory obligation on public television stations to accommodate at least some of their programming to the needs of the hearing impaired, it has declined to take specific steps to enforce the Act. *Gottfried v. FCC*, Slip Opinion 9.

27. When the FCC grants a broadcast license it grants the free and exclusive use of a limited and valuable part of the public domain. When the licensee accepts that franchise, it is burdened by enforceable public obligations. *CBS, Inc. v. FCC*, 101 S.Ct. 2813, 2829. The grant of a free license

is functionally equivalent to "government subsidization of broadcasters." *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 174, n. 5.

28. The Commission has itself noted the value of the broadcast license it gives free of charge. In *Notice of Inquiry: Fee Refunds and Future FCC Fees*, 69 FCC 2d 741, 768, the Commission stated:

> "The radio frequency spectrum is a scarce and valuable natural resource. Users of the spectrum must obtain a license from the Commission to operate, just as individuals and companies who wish to drill for oil and gas, mine coal, or graze cattle and sheep, must obtain permission from a federal agency before they can gain access to federal lands. Competitive bidding has been used in the leasing of offshore oil and gas rights in order to obtain a 'fair market value' for the use of that scarce resource. It is obvious that the spectrum is just as necessary to radio communications as crude oil is to gasoline production and land is to coal mining, cattle grazing and timber growing."
>
> (*Notice of Inquiry: Fee Refunds and Future FCC Fees*, 69 FCC 2d 741, 768).

29. The franchise given by the FCC to broadcasters for free constitutes federal financial assistance within the meaning of section 504 and the controlling HEW regulation. Federal financial assistance is defined as follows:

> " 'Federal financial assistance' means any grant, loan, contract . . . , or any other arrangement by which [Government] provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of Federal personnel; or (3) Real and personal property or any interest in or use of such property, including: (i) Transfers or leases of such property for less than fair market value or for reduced consideration, and (ii) Proceeds from a subsequent transfer or lease of such

property if the Federal share of its fair market value is not returned to the Federal government." (45 C.F.R. §§ 84.3(h) and 85.3(e)).

30. Broadcast licensees also receive through the FCC the services of federal personnel, free of charge. This constitutes federal financial assistance within the meaning of section 504. Congress, the courts, and the FCC have recognized that the Commission provides the kind of services for which it should charge fees. The Independent Offices Appropriations Act of 1972, Tit. 5, Stat. 290, 31 U.S.C. § 483(a) authorizes federal agencies to impose fees on all beneficiaries of "any work, service . . ., benefit, . . . license, . . . or similar thing of value or utility performed, furnished, provided, granted . . . by any federal agency." Congress' intent that the Act encompass many FCC activities is made clear in the Senate Report which led to the passage of the Act. It pointed out that the FCC "renders a tremendous variety of services, a substantial number of which would lend themselves to equitable fees." (S.Rep. No. 2120 at 4, 81st Cong., 2d Sess. (1950). The report listed a number of FCC services appropriate for fee assessment: "Radio station construction permits, radio station operating licenses and renewals, authorization of assignment of transfer of licenses, and certificates of public convenience and necessity." *FPC v. New England Power Co.*, 415 U.S. 345, 355 (opinion of Marshall, J.) (See, S.Rep. 2120, supra at 11).

31. The FCC suspended collecting all license fees on January 1, 1977. See *Notice of Inquiry: Fee Refunds and Future FCC Fees*, 69 FCC 2d 741 (1978) [hereafter "*First Notice: Fees*"]. It then initiated its inquiry into formulating a new fee schedule, *id.*, but has yet to promulgate a new schedule, or revoke its suspension of fees. See, *Second Report and Order, Fee Refunds and Future Fees*, 73 FCC 2d 4 (1979); *Fee Suspension, Clarification*, 42 Fed.Reg.

3169 (January 17, 1977) ("Our intention was, and is, that until further notice, no fees are to be submitted to the Commission after January 1, 1977 — without exception."). The Commission recognizes that its failure to collect fees amounts to a subsidy: "Failure to recover all reimbursable costs is tantamount to forcing taxpayers to subsidize those firms and their customers who are engaged in the production, sale and consumption of telecommunication services. Such subsidies may not be legal, necessary, equitable, economically efficient or in the public interest." *First Notice: Fees, supra*, at 758. Still, the plain fact is that for over four years the FCC has not collected *any* "reimbursable costs", and the taxpayers have continued to subsidize the broadcast industry.

Because the FCC has donated its services for over four years, thereby subsidizing licensees, it has provided them federal financial assistance, and is required to issue section 504 regulations in accordance with Executive Order No. 11914 (41 Fed.Reg. 1787). Public broadcasters, as recipients of this subsidy, have obligations under section 504. See *CBS, Inc. v. FCC, supra*, 101 S.Ct. at 2829.

32. The Communications Act requires the FCC to make determinations that the requirements of the "public interest" and the "public interest" standard must be construed to require at least some consideration of the national policy expressed by section 504. *Gottfried v. FCC*, Slip Opinion 13.

33. While the FCC is not the agency primarily responsible for enforcing section 504, nevertheless the FCC is obligated to further the national policy reflected in section 504 by appropriate rule or guideline. The FCC's "public interest" mandate must be construed to incorporate the national policy of nondiscrimination against the handicapped minority, at least insofar as that policy imposes specific legal obligations under section 504. *Gottfried v. FCC*, Slip Opinion 19.

34. By its passage of section 504, Congress placed public stations under a legal obligation to consider an attempt to serve the interests of the nation's hearing impaired minority. This policy falls well within the broad purposes of the Communications Act. The "public interest" standard established by the Communications Act imposes on the FCC an affirmative obligation to ensure that its licensees' programming fairly reflects the tastes of minority groups. *Gottfried v. FCC*, Slip Opinion 21.

35. In light of Congress' decision that recipients of federal financial assistance must extend their program to otherwise qualified members of handicapped minorities, the FCC must, at a minimum, weigh this Congressional policy in making "public interest" determinations. It is unreasonable to believe that a public station could give service cognizable as being "in the public interest" without at least making efforts to satisfy its statutory obligations. *Gottfried v. FCC*, Slip Opinion 21.

36. The FCC has itself recognized its obligation under the public interest standard to protect the interests of minority groups previously excluded from full access to broadcast programming. *Gottfried v. FCC*, Slip Opinion 22-23.

37. The task of weighing the interest of the hearing impaired is not an easy one. In pursuing the public policy represented by section 504 it is not the function of the FCC to adjudicate law violations. The Commission's responsibility is rather to effectuate the underlying national policy of providing federally assisted programs, including public television, to handicapped persons, such as the deaf, who are capable of benefiting from them. *Gottfried v. FCC*, Slip Opinion 25-26.

38. There are many ways the FCC may implement section 504. The Commission has broad discretion, but it must

do something to give meaning to that section. *Gottfried v. FCC*, Slip Opinion 28.

39. The FCC, in representations made to the United States Court of Appeals for the District of Columbia in *Gottfried v. FCC* stated that it is moving forward in the area of making television available to the hearing impaired, and that it will continue to do so. *Gottfried v. FCC*, Slip Opinion 35-36.

40. The FCC has an obligation to issue an appropriate regulation to make certain that television is made accessible to the nation's hearing impaired minority.

THE EVIDENCE AT TRIAL

41. In the absence of a government regulation specifically applicable to public broadcasters, the said public broadcasters take the position that they have *no* obligation to the deaf and hearing impaired under section 504, and the said public broadcasters assert that whatever they do to make public television accessible to the deaf and hearing impaired is done as a matter of grace, and not out of any legal obligation.

42. The only action taken by the government to make public television accessible to the deaf and hearing impaired consists of funding for "closed" captioning of programs funded by the Department of Education, and FCC authorization as broadcasters to transmit captioning for deaf and hearing impaired over Line 21 of the vertical blanking interval.

43. For deaf and hearing impaired to have access to "closed" captioning they are required to purchase an adapter which costs $250.

44. The deaf and hearing impaired, like handicapped persons generally, are at the low end of the economic spectrum. The $250 charge to obtain access to public broad-

casting is prohibitive for most deaf and hearing impaired persons. To date, less than 40,000 adapters have been sold.

45. Closed captioning, at best, serves only a small percentage of the deaf and hearing impaired. There are 2 million "stone" deaf persons in the country. Additionally, there are between 5½ million, and 18 million hearing impaired persons who cannot hear television satisfactorily.

46. "Closed" captioning and "open" captioning cost the same amount to make. The total cost of "closed" captioning is greater than the cost of "open" captioning for the public broadcaster since open captioning does not require the special equipment necessary to transmit captioning on Line 21. Plainly, "open" captioning better serves the needs of the deaf and hearing impaired than "closed" captioning. The sole reason for having "closed" rather than "open" captioning is because the government believes that approximately 10% of persons who can hear are inconvenienced by "open" captioning.

47. The government does not require public broadcasters to program any particular amount of captioning — open or closed. That decision is left wholly to the public broadcaster. At the present time only a relatively small proportion of the programming on public broadcasting has any captioning. The program time containing open captioning is minimal.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331(a), 1343(4), 1337, 1361, and 5 U.S.C. §§ 702 and 704.

2. Marcella M. Meyer and Sue Gottfried are qualified handicapped persons within the meaning of section 504. Said plaintiffs are proper representatives of the class of persons who have a physical impairment, viz., which sub-

stantially limits a major life activity, to wit, hearing.

3. As a result of the government's failure to promulgate specific regulations implementing section 504, as applied to public broadcasting, plaintiffs, qualified handicapped persons, have, on the basis of handicap, been excluded from participation in, have been denied the benefits of, and have otherwise been subjected to discrimination under programs or activities which receive or benefit from federal financial assistance.

4. The federal government, in failing to issue regulations applicable to public broadcasting, has deliberately fostered and promoted, discrimination against deaf and hearing impaired persons seeking access to programs broadcast over public broadcasting facilities. The federal government has perpetuated discrimination against the deaf and hearing impaired by providing significant assistance to public broadcasters that deny the deaf and hearing impaired the opportunity to participate in or benefit from public broadcasting, and deny to the deaf and hearing impaired television broadcasting that is not equal to or as effective as that provided to others. The action and inaction of the federal government has resulted in the denial to the deaf and hearing impaired of the enjoyment of rights, privileges, advantages, and opportunities enjoyed by those who are not hearing impaired.

5. The public policy of the United States reflected in the Constitution and laws of the United States forbids discrimination against any person because of handicap. The avowed goal of section 504 is to open a new world of equal opportunity for more than 35 million handicapped persons, including the deaf and hearing impaired. Congress expressly found the following:

> "It is of critical importance to the nation that equality of opportunity, equal access to all aspects of society and equal rights guaranteed by the Constitution of the

United States be provided to all individuals with handicaps." (Tit. III of Pub.L. 93-516, December 7, 1974, 88 Stat. 1631, 1634; see, "Historical Note" under 29 U.S.C. § 701).

6. In the same "Historical Note" Congress found that the "benefits and fundamental rights of this society are often denied those individuals with mental and physical handicaps." The handicapped, and particularly the deaf and hearing impaired have a "discrete and insular" character. They have been subjected to a "history of purposeful unequal treatment"; relegated to "a position of political powerlessness"; and possess "imutable characteristics" linked to a history of prejudice. They have been subjected to discriminatory practices in the exercise of fundamental rights, including the right to vote, to serve as jurors, to work, to raise children, and other opportunities afforded to the non-handicapped. The stigma of inferiority has been placed upon them, and they have been segregated in programs and in institutions, continually removed from the mainstream of society. The handicapped qualify as a suspect class, entitled to maximum judicial protection. See, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973); *United States v. Carolene Products*, 304 U.S. 144, 152, n. 4 (1938).

7. The denial to the deaf and hearing impaired of access to public television not only denies that group due process of law, and equal protection of the laws, but also denies them rights secured by the First Amendment. Cf. *NAACP v. FPC*, 520 F.2d 432, 442 (D.C. Cir. 1975), *aff'd NAACP v. FPC*, 425 U.S. 662 (1976). A group denied meaningful access to television is without the information necessary to participate in our democracy as informed citizens.

8. Section 504 of the Rehabilitation Act applies to public broadcasters, who receive federal financial assistance

from the Federal Communications Commission, the Departments of Education and Health and Human Services, and other federal agencies.

9. The responsible government agencies, including the Federal Communications Commission, the Department of Justice, and the Department of Education have delayed unreasonably in issuing regulations implementing section 504 as that statute applies to public broadcasting. This delay is exacerbated by the government's shifts in rulemaking responsibility applicable to public television, seemingly to avoid determination of compliance guidelines for programming for the deaf. This action by the government is tantamount to intentional discrimination against the deaf.

10. Since the responsible federal agencies have failed to promulgate any regulation to prevent discrimination against the deaf it does not appear significant whether the government's action is measured by the label of "suspect classification", "middle-tier", or "rational" analysis. The failure to promulgate any regulation implementing section 504 as it applies to public broadcasting is simply irrational in light of the avowed national policy and command to all federal agencies empowered to grant federal financial assistance to take action to enable qualified handicapped persons to achieve their full capability, foster their self-sufficiency and independence, and integrate them into the community. Practical difficulties cannot justify discrimination. "It is enough that the discrimination shown was palpably unjust and forbidden by the Act." *Mitchell v. United States*, 313 U.S. 80, 94 (1941); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973); *United States v. Carolene Products*, 304 U.S. 144, 152, n. 4 (1938).

11. The sweeping and arbitrary refusal by the government to promulgate any regulation providing for equal ac-

cess to public television by the deaf and the hearing impaired denies plaintiffs rights secured to them by section 504 and denies them due process of law and the equal protection of the laws guaranteed by the Fifth Amendment to the United States Constitution, and denies them access to ideas and information necessary to exercise their rights as first class citizens in violation of the First Amendment to the United States Constitution.

12. Plaintiffs are entitled to an order requiring the federal defendants who are here charged with the responsibility of making grants and/or contracts with reference to public television which will be shown on any public television station enjoining them from making any grants or disbursing any monies for the preparation, or the grant of any monies to any public television station for the purpose of airing the programs that have been made with public monies, until the federal agencies have set forth either regulations or by contract have provided for full compliance with section 504 by public broadcasters receiving federal financial assistance.

13. On the basis of the evidence in this case, closed captioning is not a reasonable alternative for deaf people to have access to television.

14. Plaintiffs, as the prevailing parties against the federal defendants are entitled to reasonable attorney's fees and costs in accordance with Section 505(a) and (b) of the Rehabilitation Act of 1973 (29 U.S.C. §794a (a) and (b); 28 U.S.C. §2412(d)(1)(A); Equal Access to Justice Act, Pub.L. 96-481, §204(a), 94 Stat. 2327 (1980); 5 U.S.C. §504(b)(1)(A).

15. Any finding of fact made herein which is more properly deemed to be a conclusion of law shall be deemed a conclusion of law, and any conclusion of law made herein

which may be more properly deemed a finding of fact shall be deemed a finding of fact.

Let judgment enter accordingly.

DATED: November 17, 1981.

[Stamp] MANUEL L. REAL
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

ABRAHAM GOTTFRIED PROFESSIONAL CORPORATION

By [Stamp] ABRAHAM GOTTFRIED
ABRAHAM GOTTFRIED
Attorney for Plaintiffs

ANNE BUXTON SOBOL
Attorney for Federal Defendants

APPENDIX F.

~~PROPOSED~~* Findings of Fact, Conclusions of Law and Order Dismissing Complaint Against Community Television of Southern California, as Amended November 2, 1981.

United States District Court, Central District of California.

Greater Los Angeles Council on Deafness, Inc., *et al.*, Plaintiffs, v. Community Television of Southern California, *et al.* Defendants. Civil Action Number CV 78-4715-R.

Pursuant to Fed. R. Civ. P. 41(b) and 52(a), the Court makes the following findings of fact and conclusions of law in the above-entitled matter:

I. *Findings Of Fact*

1. The defendant Community Television of Southern California (KCET), is a non-profit corporation, organized and existing under the laws of the State of California since 1962. Since September 28, 1964, it has operated a non-commercial educational television station, KCET, in Los Angeles, California, under licenses and other authorizations granted by the Federal Communications Commission.

2. KCET's viewing area encompasses Los Angeles, Orange and Ventura Counties and parts of Riverside and San Diego Counties.

3. The defendant James L. Loper has been President and Chief Executive Officer of KCET since January 1977.

4. William J. Lamb was Senior Vice President and General Manager of KCET from January 1977 through at least February 1980.

5. Mr. Clete L. Roberts was the moderator of KCET's locally-produced public affairs series, "28 Tonight" at least

---

*Overscore indicates material stricken by judge.

through February 1980.

6. From July 1977 through December 1978, KCET broadcast approximately 780 programs accessible to the hearing-impaired because they were captioned, had sign-language interpretation or were programs without any spoken words.

7. Among the programs broadcast by KCET with visual assistance during this period was the "ABC Captioned Evening News"; "Theater for the Deaf"; "Zoom!"; "Vision On"; "Nova"; "Once Upon a Classic"; "Ascent"; "The Adams Chronicles"; and "Feeling Free."

8. From July 1977 through December 1978, KCET also broadcast several programs devoted to substantive issues affecting the deaf and hearing-impaired. These included "Who Knows One"; "The Silent Minority"; and "The Only Thing I Can't Do is Hear."

9. During the first six months of 1979, KCET's monthly broadcast schedule included from 8% to 15% of total programming in forms providing visual assistance for the hearing-impaired. In April 1979, KCET broadcast approximately 600 hours of programming, of which 92 hours, or 13%, provided visual assistance for the hearing-impaired.

10. Since February 1980, KCET has continued to provide service to the hearing-impaired. In addition to broadcasting closed-captioned programs distributed by PBS, it has underwritten the open-captioned broadcast of the "Captioned ABC World News Tonight" by KCLS, Channel 58, at 9:00 p.m. Monday through Friday. KCET has also made it possible for viewers with decoder-equipped television receivers to watch a continuous feed of the AP news wire throughout the KCET broadcast day.

11. Were KCET to be required to establish its own captioning service, it would be required to make substantial

expenditures for the acquisition of new facilities as well as the hiring and training of new personnel.

~~12. The Department of Education has found KCET to be in compliance with Section 504 of the Rehabilitation Act of 1973.*~~

II. *Conclusions Of Law*

1. *Plaintiffs have failed to prove that*** KCET has ~~not~~* discriminated against the deaf or hearing-impaired in violation of Section 504 of the Rehabilitation Act of 1973 or the Fifth and Fourteenth Amendments to the Constitution of the United States.

~~2. The provision of visual assistance to hearing impaired viewers through captioning or sign language interpretation is not required by Section 504 of the Rehabilitation Act of 1973, as interpreted by the Supreme Court in *Davis v. Southeastern Community College*, 442 U.S. 397 (1979). By providing such visual assistance voluntarily, KCET has exceeded its obligations under that statute.*~~

THEREFORE, it is hereby ORDERED, that plaintiffs' complaint against defendant Community Television of Southern California be, and the same hereby is, DISMISSED.

/s/ Real
U.S. District Judge

---

*Overscore indicates material stricken by judge.
**Italicized words inserted by judge.

APPENDIX G.

Proposed Findings of Fact, Conclusions of Law and Order Dismissing Complaint Against Dr. James L. Loper.

United States District Court, Central District of California.

Greater Los Angeles Council on Deafness, Inc., *et al.*, Plaintiffs, v. Community Television of Southern California, *et al.*, Defendants. Civil Action Number CV 78-4715-R.

Filed: October 19, 1981.

Pursuant to Fed. R. Civ. P. 41(b) and 52(a), the Court makes the following findings of fact and conclusions of law in the above-entitled matter:

I. *Findings of Fact*

1. The defendant Dr. James L. Loper is President and Chief Executive Officer of Community Television of Southern California (KCET), having held that position since January 1977.

2. Dr. James L. Loper is not a recipient of Federal Financial Assistance.

II. *Conclusions of Law*

Because Dr. Loper is not a recipient of federal financial assistance, Section 504 of the Rehabilitation Act of 1973 is not applicable to him.

THEREFORE, it is hereby ORDERED, that plaintiffs' complaint against Dr. James L. Loper be, and the same hereby is, DISMISSED.

[Stamp] MANUEL L. REAL
United States District Judge

APPENDIX H.

Proposed Findings of Fact, Conclusions of Law and Order Dismissing Complaint Against Corporation for Public Broadcasting.

United States District Court, Central District of California.

Greater Los Angeles Council on Deafness, Inc., et al., Plaintiffs, vs. Community Television of Southern California, etc., et al., Defendants. No. CV 78-4715-R.

Filed: October 28, 1981.

Pursuant to Fed. R. Civ. P. 41(b) and 52(a), the Court makes the following findings of fact and conclusions of law in the above-captioned matter:

I. *FINDINGS OF FACT*

1. Plaintiffs include Sue Gottfried and Marcella M. Meyer in their individual capacity as deaf or hearing-impaired persons residing in Los Angeles County, within the Central District of California, and as representatives of the class of all persons within the viewing area served by defendant, Community Television of Southern California doing business as KCET, in Los Angeles, Orange, Ventura, Riverside and San Diego Counties, and who have physical impairments, that is, the loss of hearing impairment, severe enough to limit their enjoyment of the aural portion of television broadcasting, without the use of hearing aids.

2. The defendant Corporation for Public Broadcasting ("CPB") is a nonprofit, private corporation organized and existing under the laws of the District of Columbia. CPB was incorporated pursuant to the Public Broadcasting Act of 1967, 47 U.S.C. § 396 *et seq.*, for the purpose of facilitating the full development of non-commercial, educational radio and television broadcasting in the United States. CPB funds the production and distribution of non-com-

mercial programs and conducts other activities designed to further the growth and preserve the independence of non-commercial, educational broadcasting.

3. Plaintiffs have failed to adduce facts sufficient to allow the Court to find that recipients of funding from CPB have discriminated against members of the plaintiff class in the production and broadcasting of programs by public television stations. Plaintiffs also have failed to demonstrate that provision of captions or other types of visual aids for the assistance of the hearing-impaired would not involve undue expense to or intrusion into the customary programming procedures of public televison.

II. *CONCLUSIONS OF LAW*

1. Plaintiffs have not sustained their burden of proving that recipients of funding from CPB have discriminated against the deaf or hearing-impaired in violation of Section 504 of the Rehabilitation Act of 1973 or the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Plaintiffs have not sustained their burden of proving that provision of captioning or other visual assistance such as signing would not involve undue expense or intrusion into the customary programming procedures of public television. *See Davis v. Southeastern Community College*, 442 U.S. 397, 412-13 (1979).

THEREFORE, it is hereby ORDERED, that plaintiffs' complaint against defendant Corporation for Public Broadcasting be, and the same hereby is, DISMISSED.

[Stamp] MANUEL L. REAL
U.S. District Judge

APPENDIX I.

Findings of Fact, Conclusions of Law, and Final Order Dismissing the Complaint as to Defendant Public Broadcasting Service.

United States District Court, Central District of California.

Greater Los Angeles Council on Deafness, Inc., a California non-profit corporation; Marcella M. Meyer and Sue Gottfried, for themselves and in behalf of all others similarly situated, Plaintiffs, v. Community Television of Southern California, doing business as KCET; James L. Loper; William J. Lamb; Federal Communications Commission; Corporation for Public Broadcasting; Public Broadcasting Service; U.S. Department of Education, and its Secretary, Defendants. Civil Action No. 78-4715-R.

Filed: November 2, 1981.

The Court enters the following Findings of Fact pursuant to Federal Rule 41(b):

1. The Public Broadcasting Service is a non-profit membership corporation incorporated under the laws of the District of Columbia in 1969 for the purpose of establishing and operating an interconnection system for the distribution of television programs to non-commercial broadcast stations and networks and to complement, assist, and support non-commercial broadcasting.

2. PBS has its principal place of business in Washington, D.C. Its members are most of the licensees of the non-commercial education (public) television stations located throughout the United States and its territories.

3. PBS distributes television programs to its members and other non-commercial stations, and provides other support services for its members in such areas as promotion and fund-raising.

4. In 1979, PBS distributed a total of approximately 87 hours per week of programs to its member stations.

5. Of the programs distributed by PBS in 1979, approximately five hours per week of programs were captioned with visible subtitles for the benefit of the hearing-impaired. The form of captioning used is known as "open captioning."

6. PBS has developed the system known as "closed captioning" by which written sub-titles are provided through an unused line of the television signal and made visible on television receivers equipped with a decoder device.

7. Decoders are now available to the deaf and hearing impaired as a result of the efforts of PBS.

The Court enters the following Conclusions of Law:

1. Plaintiffs have not proved that PBS has discriminated against the deaf and hearing-impaired in violation of § 504 of the Rehabilitation Act of 1973.

2. PBS is not required to undertake affirmative action to provide further access to the deaf and hearing impaired.

The Court enters the following final Order with respect to Defendant PBS:

The Complaint against PBS is hereby dismissed with prejudice, Plaintiffs to bear all costs.

[Stamp] MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

DATED: NOV 2, 1981

APPENDIX J.

Order.

United States Court of Appeals for the Ninth Circuit.

Great Los Angeles Council on Deafness, Inc., a California nonprofit corporation, et al. Cross-Appellants, v. Community Television of Southern California, et al., and Department of Education, et al., Cross-Appellees. Nos. 80-5400, 80-5445, 80-6064, 80-6066, 81-5952, 82-5054 and 82-5280.

Before: GOODWIN, HUG and BOOCHEVER.

Filed: January 3, 1984.

The panel has voted to deny the plaintiffs-cross-appellants' petition for rehearing and reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no active judge called for a vote on whether to rehear the matter en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX K.

1. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, provides:

§794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

2. The Communications Act of 1934 as amended, provides in relevant part:

47 U.S.C. § 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose

of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 301, provides in part:

§301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

47 U.S.C. § 303 provides in part:

§ 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall —

. . . .

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each

station shall use and the time during which it may operate;

. . . .

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: . . . .

. . . .

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

. . . .

(*l*)(1) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to persons who are found to be qualified by the Commission and who otherwise are legally eligible for employment in the United States. . . . .

. . . .

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

47 U.S.C. § 307 provides in part:

§ 307. Licenses; allocation of facilities; terms; renewals

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same. . . .

47 U.S.C. § 309 provides in part:

§ 309. Application for license — Considerations in granting application

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

. . . .

Form and conditions of station licenses

(h) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other pro-

visions, a statement be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter; (3) every license issued under this chapter shall be subject in terms to the right of use or control conferred by section 606 of this title.

. . . .

3. *Constitutional Provisions*

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall . . . be deprived of . . . liberty . . . without due process of law. . . .

APPENDIX L.

Opposition of the Department of Health, Education and Welfare to the Motions for Summary Judgment by Plaintiffs and the Public Broadcasting Defendants.

United States District Court, Central District of California.

Civil No. CV-78-4715 R.

GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., ET AL., PLAINTIFFS *v.* COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA d/b/a KCET, ET AL., DEFENDANTS.

STATEMENT OF THE CASE

A. *Introduction*

This case involves the application of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 784, to public broadcasting. Plaintiffs assert that public television is financed in large part by federal funds and is therefore subject to section 504. Section 504 provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. . . ."

Plaintiffs' complaint was filed in December, 1978. Defendant KCET's motion to stay this case pending the Supreme Court's decision in *Southeastern Community College v. Davis* was denied, as were subsequent motions to dismiss filed on behalf of the federal defendants and the State defendant. The case has been certified as a class action on behalf of the hearing impaired persons within the viewing area of defendant KCET.

Cross motions for summary judgment have now been filed by plaintiffs, the public broadcasting defendants (KCET, the Los Angeles public television station, the Corporation

for Public Broadcasting, and the Public Broadcasting Service), defendant Federal Communications Commission, and defendant California Public Broadcasting Commission. Plaintiffs' motion for summary judgment seeks a ruling that section 504 applies to public broadcasting and requires captioning of public television programs. The defendant Secretary of the Department of Health, Education and Welfare agrees with plaintiffs that section 504 is applicable to public television, but opposes plaintiffs' motion for summary judgment on the ground that numerous unresolved factual issues preclude determination at this time of a section 504 compliance standard for public television. The Secretary respectfully requests that the Court permit the Department of Health, Education and Welfare, in coordination with other federal agencies that fund and regulate public television, to establish a compliance standard that states public television's obligation to the hearing impaired. The attached declaration of David S. Tatel, Director of HEW's Office of Civil Rights, documents the Department's commitment to proceed with establishing a compliance standard in this area.

B. *Arguments of the Public Broadcasting Defendants*

The public broadcasting defendants in their joint motion for summary judgment argue, alternatively and in this order: section 504 does not require affirmative action, and if it does, they are already doing enough to provide the hearing impaired access to their programs; in any case, they assert, section 504 does not apply to public broadcasting because of section 398 of the Public Broadcasting Act, 47 U.S.C. § 398, and the First Amendment; moreover, they argue, section 504 does not give rise to a private right of action, plaintiffs have not exhausted their administrative remedy before the Department of Health, Education and Welfare, and, as a final line of argument, if section 504 does require

affirmative compliance on the part of public broadcasters, the court should defer to the primary jurisdiction of the Federal Communications Commission to establish compliance standards.

C. *Position of the Department of Health, Education and Welfare*

As noted above, it is the position of the Secretary of the Department of Health, Education and Welfare that public broadcasting is subject to section 504. The Secretary believes that neither the Public Broadcasting Act, nor the First Amendment, bars application of section 504 to public broadcasting as contended by defendants KCET, CPB and PBS. As will be developed in the first section of the Department's argument below, *infra* at 5-16, the Department of HEW, in coordination with other federal departments and agencies that provide federal financial assistance to or regulate public television, is the appropriate body to establish a compliance standard under section 504 for public television. The Department has developed considerable expertise in establishing compliance standards under section 504 in other important areas, e.g., physical access to educational and transportation facilities. It has been designated the lead federal agency for coordination of enforcement of section 504 by Executive Order 11914. The Supreme Court has recognized HEW's primary responsibility for establishing compliance standards in those instances in which it is determined that section 504 requires action be taken to eliminate discrimination against the handicapped by federally-assisted programs. *Southeastern Community College v. Davis*, 99 S.Ct. 2361, 2370 (1979). The Department also has considerable expertise with the technical matters related to making television accessible by virtue of its efforts over the last decade to caption television for the hearing impaired.

The Department's position, accordingly, also dictates opposition to the motion for summary judgment of the public broadcasting defendants. The Department disputes their argument that application of section 504 to public television is barred by the Public Broadcasting Act, 47 U.S.C. § 398, and the First Amendment. As noted above, the Secretary believes that a compliance standard may be established that respects the responsibility of the public broadcasters for program content while requiring at the same time, to the extent possible, that programming be accessible to the deaf and hearing impaired.

The Secretary also rejects the argument of the public broadcasting defendants that interprets the Supreme Court's opinion in *Southeastern Community College v. Davis, supra*, to hold that section 504 imposes no obligations on recipients of federal funds. Memorandum in support of motion for summary judgment of defendants KCET, CPB, and PBS (KCET/CPB/PBS Memo.) at 23-27.

ARGUMENT

In this memorandum, the Department will argue that (1) this Court should defer to the Department and other affected federal agencies to establish a section 504 compliance standard for public television; (2) section 504 applies to public television; and (3) the Supreme Court's decision in *Southeastern Community College v. Davis, supra*, does not bar requirements that federally-assisted programs take positive steps to eliminate discrimination against the handicapped.

A. *This Court Should Permit HEW To Establish Compliance Standards And Obtain Compliance*

Although the Secretary agrees with plaintiffs' assertion that section 504 creates an obligation to the hearing impaired on the part of public television, she opposes plaintiffs' demand that this Court establish a compliance standard that

requires open captioning of all programs. The Secretary respectfully requests that the Court defer to the Department* and the other federal agencies that fund and regulate public television and permit them to consider the unanswered, complex questions that must be resolved before any standard of compliance can be formulated. See attached Declaration of David S. Tatel, Director, Office of Civil Rights, Department of Health, Education and Welfare.

Determination of a compliance standard will require consideration of the following sorts of questions. What are the existing alternatives for providing access and their impact on the service provided by public television? What would be required of local stations? How much of their programming is local in origination and how much is produced through cooperative efforts of the stations that would permit the sharing of costs related to providing access to the hearing impaired? The compliance standard must also be based on a review of the technical feasibility of providing access to various sorts of programs. For example, what means are available to permit hearing-impaired persons to understand the aural track of different sorts of "live" programs, e.g., news, interview and discussion programs? Is the captioning of programs produced on film possible? What is the availability of trained personnel to caption or sign programs? Are there in the short run sufficient persons trained in this work to staff both national production entities and local stations? What are the availability in the short run and the cost of the equipment necessary for captioning? What impact would various compliance standards have on the goal of increasing locally-originated programming? These and other questions must be considered and resolved.

---

*Content of footnote omitted.

Agency determination of the parameters of public television's obligation to the hearing impaired is essentially the relief sought by plaintiffs. In their motion for summary judgment, plaintiffs seek an injunction requiring HEW "to issue an appropriate policy statement and process the complaint against KCET." Pl. Brief at 165. The Secretary has now made the fundamental policy decision. She has determined that section 504 applies to public television and has directed the Office for Civil Rights to develop a compliance standard. Processing of the administrative complaint against KCET requires that a compliance standard be established. Permitting the Department and other federal agencies to establish the following reasons.

First, policy in this area requires coordination. A number of federal agencies provide federal financial assistance to public television. HEW provides the broadcast rights to the programs produced with its funds. The National Telecommunications and Information Administration in the Department of Commerce provides the facilities grants previously administered by HEW. In addition, a number of other agencies provide loans and grants to groups involved with television. Under Executive Order 11914, each of these agencies is obligated to issue regulations implementing section 504. Section 2 of Executive Order 11914, Attachment D to this memorandum. Section 1 of the Executive Order designates the Secretary of Health, Education and Welfare to coordinate the implementation of section 504 by all federal agencies that provide federal financial assistance. Because of the large number of agencies involved in funding public television coordination is particularly important. Establishing a coordinated section 504 compliance standard for public television can be accomplished through the Department and the Office for Civil Rights (OCR) pursuant to its responsibilities under the Executive Order.

Second, the Department and the Office of Civil Rights have considerable expertise in establishing compliance standards under section 504. In addition to publishing regulations dealing with many of the programs the Department funds itself, 45 C.F.R. Part 84 (1977), and regulations establishing standards for the 504 regulations of all other federal agencies, 45 C.F.R. Part 85, 43 Fed. Reg. 2132 (1978), the Department and the Office for Civil Rights have prepared voluminous materials interpreting the requirements of 504. For example, the Department publishes its 504 policy interpretations in the Federal Register, see e.g., "Program Accessibility" Requirements, 43 Fed. Reg. 36034 (1978); Carrying Handicapped Persons To Achieve Program Accessibility, 43 Fed. Reg. 36035 (1978); Participation of Handicapped Students in Contact Sports, 43 Fed. Reg. 36035 (1978). The Office of Standards, Policy and Research in OCR publishes a bi-monthly Policy Digest that reviews decisions under section 504, Title VI and Title IX. The Policy Digest covers such topics as the financial obligation of persons residing in state institutions to pay for their own support. OCR has prepared explanatory materials advising recipients of their obligations under section 504, e.g., Recruitment, Admissions, and Handicapped Students: A Guide for Compliance with Section 504 of the Rehabilitation Act (April 1978); Civil Rights, Handicapped Persons, and Education: Section 504 Self-Evaluation Guide for Preschool, Elementary and Secondary Education (August 1978); Section 504 Self-Evaluation for Colleges and Universities (1978). The Department is soon to issue a 350-page manual entitled "A Handbook for the Implementation of Section 504 of the Rehabilitation Act of 1973" that will analyze in detail all policy determinations made thus far under section 504.

Perhaps most importantly, staff of the Office of the General Counsel of the Department who work with OCR are assigned to each agency of the federal government for the purpose of developing and coordinating issuance of 504 regulations. The regulations issued by the Department of Transportation on the accessibility of mass transportation systems, 44 Fed. Reg. 31442 (May 31, 1979), are a good example of the result of a coordinated effort between HEW and another federal department. The HEW coordinating effort has resulted in a concentration in OCR of expertise in section 504 compliance matters as was intended by the Executive Order.

This expertise permits OCR to provide consistent answers to questions that recur in establishing 504 compliance standards. For example, how are cost factors to be handled? Is there any difference between the scope of the obligation of large and small federally-financed programs?

The expertise of the Office for Civil Rights, which bears principal responsibility for 504 policy coordination, will in this particular instance be supplemented by the years of expertise in the Department with captioning of films and television for the deaf.

Third, a uniform national compliance standard is needed. Policy in this area should not be established solely on the basis of the facts pertaining to KCET, one of the largest, most established stations in the country. A compliance standard must take into account the differing circumstances of stations of varying sizes and organization all across the country.

These three reasons—the need for coordination of the different agencies with authority to establish standards in this area, the Department's expertise in section 504, and the need for national compliance standards—are the tradi-

tional reasons given by courts choosing to defer to the primary jurisdiction of agencies. The traditional doctrine of primary jurisdiction is grounded on two basic rationales: the need for uniformity of regulation and the need for initial consideration by a body with specialized knowledge.

. . . .

The purpose served by the doctrine of primary jurisdiction will be served by its application in this case. Plaintiffs seek a resolution by the government of public television's obligation to the hearing impaired under section 504. That their purpose is not simply an adjudication of station KCET's obligation is evident from the inclusion of the Department of Health. Education and Welfare, the Federal Communications Commission, the Corporation for Public Broadcasting, the Public Broadcasting Service, and the California Public Broadcasting Commission as defendants. The relief sought by plaintiffs, the national resolution of the issue posed by their complaint, can best be accomplished by the Department and the other affected federal agencies.

. . . .

Deference to the primary jurisdiction of the federal agencies will permit this Court to benefit from the Department's section 504 expertise and will also permit a uniform national solution to be established. If, at the end of the administrative process, review of the compliance standard is sought, this Court will have a better basis for ruling than would be the case in the absence of agency action.

Plaintiffs have faulted the Department for its lack of enforcement of section 504.

. . . .

But the government's past efforts to provide a solution to the problem justify a conclusion by the Court that, having made the policy decision that section 504 requires action

by public broadcasters to eliminate discrimination, the Department will now in good faith proceed to establish a compliance standard.

. . . .

Finally, in amending section 504 to incorporate the Title VI enforcement procedures, Congress indicated its preference when possible for voluntary compliance with the nondiscrimination provision. See section 602 of Title VI, 42 U.S.C. § 2000d-1. The affected federal agencies should be permitted to establish a compliance standard for public television and to obtain compliance.

B. *Section 504 Applies To Public Broadcasting*

. . . .

C. *The Davis Case Does Not Preclude Requirements of Compliance With Section 504*

Having established that section 504 is applicable to public broadcasting, it is appropriate next to address the argument of defendants KCET, CPB and PBS that the Supreme Court's opinion in *Southeastern Community College v. Davis, supra,* holds that section 504 imposes no obligation to take steps to eliminate discrimination on recipients of federal funds. KCET/CPB/PBS Memo. at 23-27. The public broadcasting defendants assert that because the Court in *Davis* held that Southeastern Community College was not required to make modifications in its nursing program that would permit a woman with a serious hearing impairment to pursue a nursing degree, it follows that in no instance is a recipient of federal financial assistance required to take positive steps to eliminate discrimination and to permit handicapped persons to enjoy the benefits of a federally-funded program.

The Court's opinion in *Davis* supports no such assertion. To the contrary, the Court in *Davis* indicates that recipients

of federal funds are required by section 504's prohibition against discrimination to make those modifications in their programs that are necessary to meet the needs of handicapped persons, but that will not change the programs' essential character. The *Davis* opinion makes clear that the modifications that would have been required in the College's nursing program to permit participation by Mrs. Davis went beyond what was required by section 504. The Court found that Mrs. Davis' participation in the nursing program would have necessitated either the elimination of the essential clinical portion of the program or continuous individual faculty supervision. The Court held that the College was not obligated by section 504 or HEW regulations to make such a basic change in its academic program.

The public broadcasting defendants quote the following language from *Davis* in support of their assertion that section 504 creates no obligation for any modifications to be made by any recipient of federal financial assistance:

> [N]either the language, purpose, nor history of § 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks the authority to do so.

99 S.Ct. at 2369-70 (footnote omitted), cited in KCET/CPB/PBS Memo. at 25-26. This holding, however, does not preclude the conclusion that those recipients, who can make modifications that will permit participation by the handicapped without altering the essential nature of their programs, will be required to take such steps.

Moreover, in the very next paragraph the Court goes on to make clear that in some situations positive steps to eliminate discrimination will be required.

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrim-

> ination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past . . . practices might arbitrarily deprive . . . handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities [for participation.] Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a [recipient.] Thus situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accomodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.

99 S.Ct. at 2370.

Several conclusions are implicit in the Secretary's determination that section 504 applies to public television and that a compliance standard should be established. First, the technology of television is such that some modifications may be made without altering the essential service provided by public broadcasters, and, second, to fail to make such modifications to permit the hearing impaired to enjoy the benefits of public television would be unreasonable and discriminatory. In establishing a compliance standard the Department will set forth the nature of the modifications required of public broadcasters in order to avoid discriminating against the deaf and hearing impaired. How, within a range of permissible alternatives, broadcasters act to eliminate discrimination will be left to broadcasters themselves. It should again be noted that necessary modifications will not require HEW or any other federal department or agency that provides federal financial assistance to or regulates public television to tell broadcasters what programs to show or

what to say about any given topic. Modifications for access will require only that public television programming, to the extent possible, be understandable to the deaf and hearing impaired.

Also implicit in the Secretary's decision that a section 504 compliance standard should be developed is the conclusion that hearing impaired persons are "otherwise qualified" to enjoy the benefits of public television. The public broadcasting defendants take a contrary position and argue that the hearing impaired are not "otherwise qualified." KCET/CPB/PBS Memo. at 28-31. In support of this argument, these defendants place primary reliance on language in the *Davis* opinion that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." 99 S.Ct. at 2367. This language, they say, precludes a requirement that any modifications be made in the presentation of public television because hearing impaired persons cannot enjoy television in spite of their handicap because they cannot hear the aural track.

The "otherwise qualified" argument of the defendants is merely a restatement of their argument that *Davis* holds that section 504 in no case requires recipients of federal financial assistance to take positive steps to eliminate discrimination against the handicapped. Both arguments fail to reflect the reasoning of the Court in *Davis*. In *Davis*, the Court held that no reasonable modification of the College's nursing program would permit Mrs. Davis to meet the legitimate demands of the curriculum. In this sense, Mrs. Davis was not qualified in spite of her handicap. Hearing impaired persons are, on the other hand, "otherwise qualified" because some modifications of the technical presentation of public television that does not interfere with the essential nature of programming will permit the hearing impaired to

enjoy this federally-funded service in spite of their handicap.

The broadcast defendants pose a number of examples that they claim illustrate the "bizarre and illogical consequences" that would follow from a conclusion that hearing impaired persons are otherwise qualified with respect to public television. KCET/CPB/PBS Memo. at 29-30. Without stating any opinion as to the merits of the examples posed, it must be noted that to the extent that any of these examples represent situations in which it would not be possible to make modifications to permit participation by the handicapped without changing the essential nature of the service or program, then the handicapped would not be "otherwise qualified." For example, with respect to the broadcast defendants' radio example, *if* it were established that no modification could be made that would permit hearing impaired persons to enjoy public radio without changing the essential nature of this exclusively aural medium, then it would follow that with respect to public radio the hearing impaired are not "otherwise qualified."

Furthermore, the broadcast defendants' analysis of the "otherwise qualified" question would render meaningless rights of the handicapped that have been upheld by the courts in other contexts. For example, the courts have upheld the obligation of educational institutions to provide auxiliary aids to permit blind and hearing impaired students to participate in their educational programs. *Camenisch v. University of Texas*, No. A-78-CA-061 (W.D. Texas, filed May 17, 1978) (Attachment C to this memorandum); *Crawford v. University of North Carolina*, 440 F. Supp. 1047, 1050 (M.D.N.C. 1977). See 45 C.F.R. § 84.44(d) (HEW regulation requiring educational institutions to provide such aids). Similarly, the obligation of mass transportation systems to take reasonable steps to eliminate discrimination against the physically or "mobility" handicapped has been

upheld. *Vanko v. Finley*, 440 F. Supp. 656 (N.D. Ohio, 1977). See, *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir., 1977). If the public broadcast defendants' interpretation of "otherwise qualified" were correct, then schools would not be required to provide aids necessary to permit blind and deaf students to attend, and the mobility impaired would have no right of access to public buildings or public transportation.

The public defendants' arguments based on the *Davis* case, both the contention that section 504 creates no obligation to eliminate discrimination and the argument with respect to "otherwise qualified," are thus without merit.

III. CONCLUSION

In this memorandum, the Department has argued that establishing a national section 504 compliance standard for public television can best be done by the Department in coordination with other affected federal agencies, that section 504 is applicable to public television, and that positive steps to eliminate discrimination against the hearing impaired in this area are not precluded by the Supreme Court's opinion in the *Davis* case.

The Department urges that this Court rule that section 504 does require public television to make modifications in its presentation that will permit hearing impaired persons to enjoy this federally-funded service. The Department also urges this Court to deny plaintiffs' motion for summary judgment because of the unresolved questions bearing on establishment of a compliance standard. The Court should remand the question of compliance to the Department of Health, Education and Welfare. The Court may either retain jurisdiction over HEW pending completion of the process of establishing the compliance standard and an administrative ruling on the compliance against defendant KCET, or

the Court may dismiss this lawsuit without prejudice to its refiling if plaintiffs wish to seek review of agency action in this area. The motion for summary judgment by the public broadcasting defendants should be denied.

Respectfully submitted,

ALICE DANIEL
Acting Assistant Attorney General

ANDREA SHERIDAN ORDIN
United State Attorney

FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

MICHAEL E. WOLFSON
Assistant United States Attorney

/s/ R. John Seibert
R. JOHN SEIBERT

/s/ Anne Buxton Sobol
ANNE BUXTON SOBOL
Attorneys for Federal Defendants

Of Counsel:
JAIME FERNANDEZ
Counsel
Department of Health,
Education and Welfare
Dated: October 25, 1979.

No. 83-1614

In the Supreme Court of the United States

OCTOBER TERM, 1983

SUE GOTTFRIED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

The questions affecting the federal respondents are as follows:

1. Whether the Federal Communications Commission, the Department of Education, or the Attorney General is legally obligated to promulgate regulations specifying the requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, in the field of television programming.

2. Whether the Federal Communications Commission is required by the Communications Act of 1934, 47 U.S.C. 301 *et seq.*, or by the First or Fifth Amendments to promulgate regulations specifying the measures that broadcasters must take to make their programming understandable to the hearing impaired.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Constitution, statutes and regulations:

Page

Constitution, statutes and regulations—Continued:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1614

SUE GOTTFRIED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 719 F.2d 1017. The district court's judgment (Pet. App. 16-18) and its findings of fact and conclusions of law (Pet. App. 19-40) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1983, and a petition for rehearing was denied on January 3, 1984 (Pet. App. 46). The petition for a writ of certiorari was filed on March 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is one of several closely related proceedings initiated in different forums by petitioners and others regarding the captioning of television programs for the

hearing impaired. This Court is already familiar with one of these cases — the litigation that began with an attempt by petitioner Sue Gottfried and another party[1] to block the license renewal applications of major commercial and noncommercial television stations in Los Angeles. The Federal Communications Commission rejected the request for denial of license renewal. The court of appeals affirmed with respect to the commercial stations (*Gottfried* v. *FCC*, 655 F.2d 297, 312-316 (D.C. Cir. 1981), and this Court denied certiorari (454 U.S. 1144 (1982)). The court of appeals, in the same opinion, vacated the FCC's order with respect to the noncommercial station, KCET, holding (655 F.2d at 306-312) that the Commission was required to make an independent assessment of whether the station's programming complied with Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. 794, which prohibits discrimination against the handicapped in federally assisted programs or activities. This Court reversed. *Community Television of Southern California* v. *Gottfried*, Nos. 81-298 & 81-799 (Feb. 22, 1983). The Court held that the agencies that provide financial assistance to broadcasters have the obligation to enforce Section 504 and that the Commission, which does not provide such funding, had acted properly in adopting a policy of considering a station's programming under the public interest standard of the Communications Act of 1934 (Communications Act), 47 U.S.C. (& Supp. V) 307(a) and (d), 308(a), 309(a) and (d), while also taking into account any Section 504 violations found by the funding agencies. (For convenience, we will refer to this litigation as "*Gottfried I.*")

---

[1]The other party was the Greater Los Angeles Council on Deafness, Inc. (GLAD), which was a plaintiff in this case. GLAD was dismissed by the district court for lack of standing and did not appeal (see Pet. App. 2 n.3).

2. In the present case, petitioners brought a class action in the United States District Court for the Central District of California, claiming that public television stations that receive federal financial assistance are required by Section 504, as well as by provisions of Title III of the Communications Act of 1934, 47 U.S.C. (& Supp. V) 301 *et seq.*, and various constitutional provisions, to provide "open captioning" for their programs. (Open captions are visible to all viewers; "closed captions" are visible only on television sets equipped with special decoding devices).[2] Petitioners accused the Corporation for Public Broadcasting (CPB),[3] the Public Broadcasting Service (PBS),[4] and Community Television of Southern California (the licensee of KCET) of acting unlawfully by producing, distributing, and broadcasting programs without open captions. Petitioners alleged that the Federal Communications Commission, the Department of the Health, Education, and Welfare and its successor the Department of Education, and the Attorney General had improperly failed to promulgate regulations specifying broadcasters' obligations with respect to captioning. And petitioners claimed that HEW, the Department of Education, and the FCC had distributed federal financial assistance to stations and other broadcasting entities that had not met their captioning obligations.

After petitioners put on their case, the district court dismissed the complaint against CPB, PBS, and KCET, holding that petitioners had failed to prove that those

---

[2]The decoders cost approximately $250 (Pet. App. 2 n.2).

[3]The Corporation for Public Broadcasting is a government-chartered corporation that receives federal funds and, among other things, makes grants to public broadcasting stations and funds the production of programs. See 47 U.S.C. (& Supp. V) 396-399b.

[4]The Public Broadcasting Service is a non-profit corporation governed by member public stations that schedules, promotes, and distributes noncommercial television programs.

defendants had discriminated against the hearing impaired (see Pet. App. 5, 19-20, 38-40). After trial, however, the court held that "closed captioning is not a reasonable alternative for deaf people to have access to television" (Pet. App. 36), "thus implying that only open captioning would comply with the Rehabilitation Act" (*id.* at 6). The court held that the federal agencies' failure to promulgate regulations specifying captioning requirements resulted in discrimination against the hearing impaired (Pet. App. 33) and violated not only Section 504 of the Rehabilitation Act, but also the Due Process and Equal Protection Clauses and the First Amendment (Pet. App. 34-36). The court therefore enjoined the federal defendants from expending any funds for public television programming, with the exception of funds related to open captioning (*id.* at 16-18).

3. The court of appeals reversed the judgment against the federal defendants and affirmed the dismissal of the complaint against CPB, PBS, and KCET (Pet. App. 1-12). First, relying on *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), the court of appeals held that the district court had erred in ordering the termination of funding since "nothing in the structure of the Rehabilitation Act * * * authorizes court-mandated termination of funds upon the request of a private plaintiff"[5] (Pet. App. 7).

The court then held that the federal agencies were not required to promulgate regulations. Requiring the Attorney General to promulgate regulations was error, the court held (Pet. App. 8), because his "responsibility entails the review of proposed regulations, but not their promulgation."[6] Citing this Court's decision in *Gottfried I*, the court

---

[5]Petitioners have not sought review of this holding.

[6]By Exec. Order No. 12,250, 45 Fed. Reg. 72995 (1980), the responsibility for coordinating implementation of Section 504 was transferred from the Secretary of HEW to the Attorney General. However, the executive order did not require the Justice Department itself to issue regulations or otherwise interpret Section 504.

concluded that the FCC was not compelled to issue regulations under Section 504 because the FCC does not provide financial assistance to public stations (Pet. App. 8). And relying on the well established rule that federal agencies generally have discretion to proceed by rulemaking or adjudication in interpreting their governing statutes (see, *e.g., NLRB* v. *Bell Aero Space Co.*, 416 U.S. 267, 294 (1974)), the court held that the Department of Education had not abused its discretion in employing adjudication, rather than rulemaking, to specify Section 504's requirements in the area at issue.

Turning to the dismissal of the complaint against CPB, PBS, and KCET, the court noted that the Department of Education requires stations receiving its assistance to broadcast programs containing closed captions in such a way that the captions can be received on a properly equipped set[7] (Pet. App. 11). Under *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), the court concluded, public stations are not required to take further affirmative action (Pet. App. 10-11).

Finally, the court of appeals noted (Pet. App 12) that petitioners' constitutional claims were "not well articulated" and found "no support in any existing legal precedent."

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, petitioners seek, in large measure, to relitigate matters already conclusively decided against them. Accordingly, further review of this case is not warranted.

---

[7]The Department of Education also requires that all programs produced with its funds be closed captioned.

1. Petitioners first contend (Pet. App. 12-15) that the Department of Education, the Attorney General, and the Federal Communications Commission are legally obligated to promulgate regulations defining the requirements of Section 504 in the field of noncommercial television programing. This contention lacks merit for at least two reasons.

a. First, two of these respondents — the FCC and the Attorney General — are not responsible for enforcing the Rehabilitation Act and thus can hardly be required to issue interpretive regulations. In *Gottfried I*, this Court held (slip op. 11-12) that the responsibility for enforcing the Rehabilitation Act had been entrusted to those agencies that provide federal financial assistance. Petitioners have made no effort to show that the Attorney General provides such assistance. They attempt at considerable length to show that the FCC furnishes such aid, but their arguments are invalid, and in any event this issue has previously been decided against them.

In *Gottfried I*, the court of appeals rejected the claim that the FCC provided financial assistance to broadcasters by granting them licenses (655 F.2d at 312-314). Sue Gottfried (one of the petitioners here) and the Greater Los Angeles Council on Deafness, Inc. (a plaintiff below)[8] filed a petition for a writ of certiorari (No. 81-651) claiming that a broadcast license constitutes federal financial assistance under Section 504 (Pet. App. 5-10) and that the FCC also provides such assistance to broadcasters when it processes various applications without charging fees (Pet. App. 11-12). In our brief in opposition, we showed that these arguments are inconsistent with the statutory language, legislative history, and administrative interpretations of the

---

[8]See note 1, *supra*.

Rehabilitation Act and the statutes on which it was modeled. This Court denied the petition (454 U.S. 1144 (1982)).

Petitioners' argument was again rejected when this Court held in *Gottfried I* (slip op. 11) that "[i]t is clear that the [Federal Communications] Commission is not a funding agency * * *."[9]

Petitioners' suggestion that *Grove City College* v. *Bell*, No. 82-792 (Feb. 28, 1984), overturned this conclusion is completely without foundation. In *Grove City*, the Court held that certain federal grants given to a college's students constituted federal financial assistance to the college's financial aid program within the meaning of Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a). The Court also held that Title IX prohibits sex discrimination in the program receiving the assistance but not in other aspects of the college's operations. *Grove City* had nothing to do with the FCC or with licenses of any sort, and we fail to see how it can support petitioner's argument here.[10]

---

[9]There is also no merit to petitioners' suggestion (Pet. 19) that the FCC must issue regulations because, as amended in 1978, Section 504 applies not only to federally-funded programs but also to "any program or activity conducted by any Executive agency." 29 U.S.C. 794. As we noted in our brief in *Gottfried I*, Nos. 81-298 and 81-799 (at 8 n.7), "[the] programming of broadcasters licensed by the Commission is not a 'program or activity conducted by' the Commission itself" and is thus not affected by the 1978 amendment. See 124 Cong. Rec. 13901, 38551 (1978) (remarks of Rep. Jeffords, author of 1978 amendments).

[10]The court of appeals' decision reversing the judgment against the FCC is also supported by this Court's recent decision in *ITT World Communications* v. *FCC*, No. 83-371 (Apr. 30, 1984). The Court there noted (slip op. 11) that exclusive review of Commission orders lies in the court of appeals and that "[l]itigants may not evade this requirement by requesting the District Court to enjoin action that is the outcome of the agency's order." As we argued below (see our court of appeals brief at 59-63), the district court in this case lacked jurisdiction to entertain

b. Petitioners' claim that funding agencies are legally required to issue regulations construing Section 504 runs afoul of the basic principle of administrative law that agencies generally have the discretion to interpret their governing statutes by adjudication or by rulemaking. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. at 294; *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765-766 (1969); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 201 (1947). Petitioners completely ignore this precept and instead rely on the fact that the federal respondents previously stated on various occasions that regulations or guidelines were being developed (see Pet. 10-14). Those statements were made in good faith and were correct when made. The responsible agencies subsequently decided, however, that Section 504's requirements in the field of television programming could be better defined through adjudication. Petitioners have cited no authority, and we are aware of none, holding that an agency is precluded from proceeding by adjudication if it initially expresses as intention to employ rulemaking.[11]

In addition, as the court of appeals recognized (Pet. App. 10), the development of standards by adjudication has a number of advantages in this context. It "permit[s] the Government to remain responsive to the developing technology in this area" (*ibid.*). And "[u]se of adjudication and contract conditions allows the Government to work with producers and broadcasters in developing programs that are accessible to hearing impaired viewers" (*ibid.*).

---

petitioners' claims against the FCC, since those claims were previously considered and rejected in Commission orders. See *License Renewals — Los Angeles*, 69 F.C.C. 2d 451 (1978), 72 F.C.C. 2d 273 (1979), rev'd in part, aff'd in part, *Gottfried* v. *FCC*, 655 F.2d 297 (D.C. Cir. 1981), rev'd in part, *Community Television of Southern California* v. *Gottfried, supra;* see also *Equal Employment Opportunity Rules*, 76 F.C.C. 2d 86 (1980) (denying rulemaking petition), reconsid. denied, 80 F.C.C. 2d 299 (1980), aff'd, *California Ass'n of the Physically Handicapped* v. *FCC*, 721 F.2d 667 (9th Cir. 1983).

[11]Futhermore, as the court of appeals noted (Pet. App. 9), "the Government preserved its claims that it need not issue regulations at all stages of the proceedings [in district court]."

Petitioners argue (Pet. 14), however, that the agencies' failure to promulgate rules has resulted in the continuation of "a Catch-22 situation where broadcasters escape *ad hoc* consideration of discrimination against deaf people because there are no rules or standards by which to judge them." That charge is false, as is illustrated by the adjudication of an administrative complaint filed against KCET under Section 504 by one of petitioner's attorneys, Abraham Gottfried, Esq. The Department of Education rejected Mr. Gottfried's claim that KCET's programming discriminated against hearing impaired persons.[12] The Department concluded that KCET had complied with Section 504 by broadcasting federally subsidized programs containing closed captions in such a way that the captions could be received by viewers with decoders.

The adjudication of Mr. Gottfried's complaint against KCET shows that Section 504's requirements in the area at issue are being considered and decided by the responsible agencies. Petitioners' disagreement with the results of those adjudications provides no basis for requiring the agencies to proceed by rulemaking.

Finally, petitioners assert (Pet. i-ii) that this Court held in Gottfried I "that rulemaking is the best method of defining the duty of public broadcasters under the Rehabilitation Act * * *." See also Pet. 9-10. As the court of appeals observed (Pet. App. 10), however, this Court's decision "contains no suggestion that the Government must proceed by rulemaking."[13]

---

[12]The Department of Education's decision was appended to KCET's brief (at 1a-7a) in *Gottfried I*.

[13]This Court did note (*Community Television of Southern California* v. *Gottfried*, slip op. 13 n.18) that it is preferable for changes in licensing policies to be made prospectively and that rulemaking is "generally a 'better, fairer, and more effective' method of implementing a new industry-wide policy than is the uneven application of conditions

2. Petitioners contend (Pet. 20) that the FCC is required by the Communications Act to issue regulations specifying the steps that broadcasters must take to make their programming understandable to hearing-impaired viewers. This argument is also invalid. As we explained at length in our brief in *Gottfried I* (at 3-7, 34-43), for more than a decade the Commission has attempted to encourage the development of technically and financially feasible means of making television accessible to the hearing impaired, but the Commission has concluded that, at present, technological and financial problems are such that it should generally rely on voluntary initiatives rather than mandatory requirements under the Communications Act. This Court has held that the Commission must be permitted "to implement its view of the public-interest standard of the Act 'so long as that view is based on consideration of permissible factors and is otherwise reasonable.' " *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (quoting *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978)). Under this standard, the Commission's well-considered approach to the issue of captioning must be sustained.

3. Finally, petitioners contend (Pet. 20-21) that they have been denied the benefits of public television in violation of the First and Fifth Amendments. As the court of appeals held, however, there is no authority that even remotely supports petitioners' ill-defined claims.

---

in isolated *license renewal proceedings*." (*id.* at 13 (emphasis added)). These remarks dealt solely with licensing proceedings, where new interpretations can be particularly harsh. With respect to funding agencies, the Court stated merely that interpretive rules "may be promulgated" if the agency chooses (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

MAY 1984

DOJ-1984-05

No. 83-1614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUE GOTTFRIED and MARCELLA M. MEYER for themselves and on behalf of the deaf and hearing impaired population within the Greater Los Angeles area,

Petitioners,

v.

UNITED STATES OF AMERICA; DEPARTMENTS OF HEALTH, EDUCATION AND WELFARE; EDUCATION; AND JUSTICE; FEDERAL COMMUNICATIONS COMMISSION; AND COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA dba KCET-TV,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENT COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA IN OPPOSITION

THEODORE D. FRANK *
RODNEY F. PAGE
CRAIG ISCOE
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
202/857-6016
Counsel for Community Television of Southern California

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1614

SUE GOTTFRIED and MARCELLA M. MEYER for themselves and on behalf of the deaf and hearing impaired population within the Greater Los Angeles area,

Petitioners,

v.

UNITED STATES OF AMERICA; DEPARTMENTS OF HEALTH, EDUCATION AND WELFARE; EDUCATION; AND JUSTICE; FEDERAL COMMUNICATIONS COMMISSION; AND COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA dba KCET-TV,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENT COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA IN OPPOSITION

STATEMENT OF THE CASE

This case is based on petitioners' allegations that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, requires a Los Angeles noncommercial educational (public) television station, Community Television of Southern California ("KCET"), to provide open captions on every program that it broadcasts. Petitioners' Appendix

("Pet. App.") at 3.[1] Only last term, in *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 103 S.Ct. 885 (1983), this Court considered related allegations brought by the same petitioners against KCET and the Federal Communications Commission ("FCC") and resolved that case in favor of KCET and the FCC.[2] In the instant case, petitioners again contend, *inter alia*, that KCET's service to the hearing impaired violates Section 504. The district court dismissed that claim, finding at the close of petitioners' case-in-chief that they had failed to prove that KCET violated that provision. (Pet. App. at 40). The court of appeals upheld that dismissal. (Pet. App. at 5).

The complex and prolonged history of this case is set forth in the opinion of the court of appeals (Pet. App. at 2-6) and KCET will not repeat it at length here. Briefly, petitioners'[3] initial complaint was filed against KCET, two of its officers, the Corporation for Public Broadcasting ("CPB"), the Public Broadcasting Service ("PBS"), the FCC and the Department of Health, Education and Welfare ("HEW").[4] After HEW was re-

---

[1] Open captioning is subtitling that is visible on all television sets. "Closed captioning" is captioning that is visible only on television sets equipped with decoders. *See* Pet. App. at 1-2.

[2] The question before the Court in that case was "whether § 504 of the Rehabilitation Act of 1973 requires the Federal Communications Commission to review a public television station's license renewal application under a different standard than it applies to a commercial licensee's renewal application." *Community Television of Southern California v. Gottfried*, 459 U.S. 498, ——, 103 S.Ct. 885, 887 (footnote omitted). The Court held that it does not. *Id.*

[3] One of the original complainants, the Greater Los Angeles Council on Deafness, Inc., was dismissed for lack of standing, and did not appeal that dismissal.

[4] During the course of these proceedings, the claims against the individual defendants were dismissed as those individuals terminated their relationship with KCET. Minute Order, June 15, 1981 (dismissing William J. Lamb); Minute Order, October 19,

structured in 1980, the Department of Education was substituted for HEW. (*See* Notice of Substitution of Parties, May 19, 1980). Subsequently, petitioners added the Department of Health and Human Services and the Attorney General as defendants. (*See* Order, September 1, 1981).

As regards KCET, petitioners alleged that it had "intentionally" "conspired" to deprive the hearing impaired of their rights under Section 504 by broadcasting most programs "with audibles (sound) only" and that the programming that was captioned or signed was broadcast at "grossly inconvenient hours." (Complaint at pp. 9, 10.) Petitioners requested the district court to enjoin KCET from broadcasting any programs that were not open captioned and also sought compensatory and punitive damages. (*Id.* at 10-12).

At trial, petitioners' case consisted of the testimony of ten witnesses, seven of whom were hearing impaired individuals who testified as to the difficulties they experienced in watching television and their desire for more visually assisted programs. The other three witnesses were KCET employees who testified about KCET's efforts to serve the deaf.[5] After the close of petitioners' case, all the defendants moved for dismissal under Fed. R. Civ. P. 41(b). Although the district court noted, "Mr. Gottfried, you . . . have raised more questions than you have answered in your case" (transcript of February 13 and 14, 1980, p. 254), it did not rule on those motions at that time. Instead, taking a suggestion which HEW made in connection with the motions of KCET, CPB and

---

1981 (dismissing James L. Loper). Petitioners' claims against CPB and PBS were dismissed by the district court at the same time that it dismissed the claims against KCET. Pet. App. at 38-45. The court of appeals upheld those dismissals, Pet. App. at 10-11, and petitioners have not sought review here of those actions.

[5] Transcript of February 13 and 14, 1980, pp. 18-63, 86-102, 107-157, 178-196, 244-247.

PBS for summary judgment,[6] the district court remanded the case to HEW to develop compliance standards for public television under Section 504. (Pet. App. at 4, 13-14).

In August 1981, the Department of Education informed the Court that it had decided not to adopt regulations specifying the obligations of public television licensees to the hearing impaired, but rather would deal with questions as to whether a public television station was complying with Section 504 on a case-by-case basis.[7] Upon being so informed, the district court ordered that trial resume that Fall. In September, prior to the resumption of the trial, KCET, CPB and PBS renewed their Rule 41(b) motions. The district court granted those motions, holding that petitioners had failed to prove that KCET, CPB and PBS had violated Section 504. (Pet. App. at 5, 38-45). Those holdings were affirmed by the court of appeals.

ARGUMENT

This case does not warrant review by this Court. First, the conclusion of the lower courts that respondent KCET did not violate Section 504 is fully consistent with the prior decisions of this Court and this case does not raise any novel or significant issues which require consideration by this Court. Second, the record clearly demonstrates that KCET has been responsive to the concerns of the hearing impaired and that the essence of petitioners' concern is a desire that KCET do more. Grant of that relief will, under this Court's decision in *South-*

---

[6] *See* Pet. App. at 52-67.

[7] At the same time, the Department advised the Court that it had dismissed Petitioner Gottfried's complaint against KCET. Gottfried had filed that complaint prior to instituting this action, alleging that KCET's failure to caption its programming violated Section 504. In August 1981, the Department of Education informed the Court that it had concluded that Gottfried's complaint was without merit. Pet. App. at 5, n.5.

eastern Community College v. Davis, 442 U.S. 397 (1979), require the district courts to resolve complex technical, economic, and programming issues. As this Court noted in *Davis*, *id.* at 413, these are the types of issues which administrative agencies are uniquely situated to resolve. The lower courts' action preserves the ability of those agencies to resolve these issues while avoiding the necessity for the district courts to deal with them.

I. The Courts Below Correctly Held That KCET Did Not Violate Section 504

The district court and the court of appeals were correct in finding that KCET did not violate Section 504. In *Southeastern Community College v. Davis*, *supra*, this Court explicitly held that "neither the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds." 442 U.S. at 411. Rather, Section 504 only prohibits discrimination, and thus a successful claim under that section must demonstrate that the defendants intentionally discriminated against handicapped individuals. In the absence of such "animus against handicapped individuals", the claim must fail. *Id.* at 413. *Accord Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402, 1409-1410 (5th Cir. 1983); *American Public Transit Ass'n v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981). *Cf. Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71 (1st Cir. 1981); *Upshur v. Love*, 474 F.Supp. 332, 342 (N.D. Cal. 1979). Nothing in the record in this case supports the notion that KCET has intentionally discriminated against the hearing impaired.

Further, as both the lower coutrs recognized, making television programming accessible to the hearing impaired would require that KCET undertake affirmative steps to alter its programming. As the court of appeals noted, television broadcasting is composed of both visible and

audible components, and persons with hearing impairments have a diminished ability to receive the audible components. (Pet. App. at 11). Thus, the court of appeals properly found:

> . . . some sort of affirmative modification of normal television broadcasting is required in order to compensate for the deaf and hearing-impaired viewers' inability to receive the audio portion. In applying the *Davis* analysis to this situation, the district court has correctly concluded that the private defendants did not violate Section 504 by failing to take affirmative action to caption or sign all of the programs broadcast.

(Pet. App. at 11).[8]

While petitioners contend that dicta in *Davis* indicates that, in appropriate circumstances, a defendant's refusal to make modifications in federally-assisted programs might constitute discrimination, it is clear from that decision that the Court was referring to minor adjustments. Thus, it stated:

> It is possible to envision situations where an insistence on continuing past . . . practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of those goals without imposing undue financial or administrative burdens . . . . Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.

Id. at 412-13. Since the Court found the adjustment required to accommodate the plaintiff in that case to be

---

[8] It should also be noted that Section 504 applies only where a handicapped individual is "able to meet all of a program's requirements in spite of his handicap." *Davis, supra* at 406. As such, it is questionable whether petitioners satisfy that threshold test.

"major", it held that the defendant was not required to make the "substantial modifications" necessary to accommodate her handicap.

The types of modifications petitioners seek here involve the same types of "major adjustments" and "fundamental alterations". Indeed, open captions fundamentally alter the visual component of television programming. Moreover, such affirmative changes would be extraordinarily expensive. The trial record indicates that KCET would have to spend at least $2.8 million, or 20% of its FY 1978 budget, to caption its programming. *See* Declaration of Dr. James L. Loper, Sept. 28, 1979, ¶ 20.[9]

Nothing in Section 504 imposes such substantial financial burdens on recipients of federal assistance. *Davis, supra*, at 412.[10] Indeed, requiring KCET to caption all its programs would materially impair, if not preclude, its ability to achieve the very services to its general audience for which Congress provided the funds to public broadcasting in the first instance. Clearly then, Section 504 does not require that KCET devote the resources necessary to caption its programming for the hearing impaired.[11]

---

[9] Of course, KCET would not be the only public television station affected by such a requirement and the system-wide costs would be vastly greater.

[10] In an analogous situation, this Court observed, "When Congress does impose affirmative action obligations on the States, it usually makes a far more substantial contribution to defray costs. . . . It defies common sense, in short, to suppose that Congress implicitly imposed this massive obligation. . . ." *Pennhurst State School v. Halderman*, 451 U.S. 1, 24 (1981), *on remand*, 673 F.2d 647 (3d Cir.), *reversed and remanded*, 104 S. Ct. 900 (1984).

[11] Because Section 504 does not require KCET to caption its programming, the Court need not address the petitioners' sixth issue, *i.e.*, whether this Court's decision in *Grove City College v. Bell*, 104 S.Ct. 1211 (1984), requires that Section 504 apply to all

II. The Court of Appeals' Action Avoids Imposing Onerous And Unnecessary Burdens On The Lower Courts

The record in this case demonstrates that KCET has been sensitive to the concerns of the hearing impaired in the Los Angeles area. Notwithstanding petitioners' protestations, KCET has presented a substantial amount of programming which was captioned, signed, or otherwise made available to those with hearing handicaps.[12] Given KCET's efforts to serve petitioners, interpreting Section 504 as imposing some affirmative obligation on public television licensees will require the district court to determine whether those efforts are sufficient, or whether, as petitioners contend, more is required.

That will require the court to resolve extremely complex technical, economic and programming issues. The process of making television programming accessible to the hearing impaired involves many trade-offs related to costs, interference with the visual portion of the program,

---

of KCET's activities or to only those financed by the direct receipt of federal funds.

In all events, however, petitioners' reliance on *Grove City College* is misplaced. The court of appeals did not hold, as petitioners seem to indicate, that Section 504 does not apply to the activities of a public television station which are funded under a general, unrestricted grant. All the court of appeals held was that where public television stations receive program-specific grants, as in the case of funding by the Department of Education, Section 504's obligations attach to the specific program for which assistance was provided. That holding is fully consistent with the decision in *Grove City College*.

[12] At the time of trial (February 1980), 13% of KCET's total broadcast time was captioned or signed. Transcript of February 13 and 14, 1980, p. 196. During fiscal year ("FY") 1979, KCET presented more than 600 hours of programming that was captioned, subtitled or signed, an increase of approximately 100 hours over the amount of such programming that KCET broadcast during FY 1978. *Id.*, pp. 178-180. A lack of technical equipment and adequate funding prevented KCET from broadcasting more captioned, subtitled or signed programming. *Id.* at p. 191.

time delays to permit the captioning and other similar issues. In addition, there is still a substantial debate as to the best technical vehicle for captioning programming and whether teletext, or the existing Line 21 system, offers the best hope for making captioned programming widely available.[13]

However, district courts are ill-equipped to handle these complex, technical issues. As this Court noted in *Davis*, "identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of . . . [the appropriate funding agencies]." *Davis, supra* at 413. Those agencies have the expertise and resources to deal with these issues and, through the notice and comments procedures of the Administrative Procedure Act, can solicit the views of a wide range of interested parties. District courts, on the other hand, lack that data gathering ability and are limited to the record developed in the course of a single trial.[14]

By interpreting Section 504 as it did, the court of appeals avoided entwining the district courts in these types of issues, while leaving the administrative agencies free to respond to changes made possible by advancing technology. This Court should not upset that result.

---

[13] *See Authorization of Teletext*, 53 P&F Rad. Reg. 2d 1309 (1983); *Captioning for the Deaf*, 63 F.C.C.2d 378 (1976). "Teletext Still Better", *Communications Daily*, Vol. 4, No. 45, p. 3 (March 6, 1984).

[14] Administrative interpretation also permits even-handed treatment of all public television licensees, rather than imposing substantial new and onerous burdens on a single licensee. *Cf. Community Television of Southern California v. Gottfried, supra*, 459 U.S. at 498, 103 S. Ct. at 893 [industry-wide rulemaking is generally a "better, fairer, more effective" way of proceeding].

Accordingly, grant of certiorari in this case is inappropriate. The lower courts properly applied this Court's decisions in resolving the issues upon which petitioners seek review and this case presents no novel issues which warrant this Court's consideration. The district court made a finding of fact, at the close of petitioners' case, that petitioners had not proved that KCET had violated Section 504. The court of appeals upheld that finding. No further consideration of that issue is required.

CONCLUSION

For the reasons set forth above, the requested petition for a writ of certiorari regarding respondent Community Television of Southern California should be denied.

Respectfully submitted,

THEODORE D. FRANK *
RODNEY F. PAGE
CRAIG ISCOE
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
202/857-6016
Counsel for Community Television of Southern California

* Counsel of Record

May 4, 1984

No. 83-1614

In the Supreme Court of the United States

OCTOBER TERM, 1983

SUE GOTTFRIED, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF IN RESPONSE TO OPPOSITION OF THE FEDERAL RESPONDENTS AND RESPONDENT COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA

ABRAHAM GOTTFRIED,
Professional Corporation,
2049 Century Park East,
Suite 2400,
Los Angeles, California 90067
(213) 277-5000,

STANLEY FLEISHMAN,*
A Professional Corporation,
2049 Century Park East,
Suite 3160,
Los Angeles, California 90067
(213) 551-2923

CHARLES FIRESTONE,
Communications Law Program,
UCLA School of Law,
405 Hilgard Avenue,
Los Angeles, California 90024
(213) 825-6211

*Counsel of Record

Attorneys for Petitioners

Of Counsel:

RODNEY R. JONES,
PAUL L. HOFFMAN,
LAW INSTITUTE FOR THE DISABLED AND ELDERLY,
Southwestern University School of Law,

SAMUEL ROSENWEIN.

Westside Law Publishers Los Angeles, California (213) 477-0491

TABLE OF AUTHORITIES

Cases **Page**

Statutes

No. 83-1614

In the Supreme Court of the United States

OCTOBER TERM, 1983

SUE GOTTFRIED, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.

PETITIONERS' REPLY BRIEF IN RESPONSE TO OPPOSITION OF THE FEDERAL RESPONDENTS AND RESPONDENT COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA

This reply addresses both the Brief for the Federal Respondents in Opposition ("Fed. Opp.") and the Brief for Community Television of Southern California in Opposition ("KCET Opp.").

1. The Solicitor General asserts that the Department of Justice is not responsible for enforcing the Rehabilitation

Act and thus can hardly be required to issue interpretive regulations (Fed. Opp. 6). In *Gottfried I*, however, the Solicitor General acknowledged that the Department of Justice does have that responsibility, to insure that "unified Federal standards will emerge" (Reply Br. for FCC, 9 n. 6). The Solicitor General advised this Court that the Department of Justice,

> the agency now responsible for coordinating implementation of section 504 is presently preparing regulation guidelines concerning what obligation section 504 imposes on broadcasters, and producers receiving Federal financial assistance. Those regulations, when promulgated, will help to insure uniform enforcement of section 504 by funding agencies with respect to all public television stations.

(Pet. 14).

The Department of Justice assumed responsibility for coordinating the implementation of section 504 from the Department of Health, Education and Welfare ("HEW"). *Consolidated Rail Corp. v. Darrone*, _____ U.S. _____, 104 S.Ct. 1248, 1254 n. 14 (1984). HEW advised the District Court that as the coordinating agency for section 504 it had the responsibility for promulgating a regulation to make television understandable for hearing impaired people (Pet. App. 57). That responsibility passed to the Department of Justice when it became the coordinating agency.

2. Throughout the litigation the Executive Department repeatedly represented to the District Court that a regulation was necessary, and that policy in this new area could not be adequately established in isolated administrative adjudications (Pet. 12-15; Pet. App. 53-61). In *Gottfried I*, this Court accepted the Solicitor General's argument

that policy in this area could only be set by rule making and could not be made in isolated license renewal proceedings. The Court stated that rule making is "generally a 'better, fairer, and more effective' method of implementing a new industry-wide policy than is the uneven application of conditions in isolated license renewal proceedings." 103 S.Ct. at 893.

The Department of Education's ("ED") adjudication on February 12, 1982 of petitioners' complaint filed in 1978 does not relieve the Executive Department of its obligation to issue a regulation.[1] The Secretary of HEW explained why a regulation was necessary and why policy in this area could not be set by individual adjudications (Pet. App. 57-59). ED's adjudication of the stale complaint did not purport to serve as a national guideline defining what obligations section 504 imposes on broadcasters and producers receiving Federal financial assistance. Indeed the decision did not even conclude, as the federal respondents erroneously state it did (Fed. Opp. 9), that KCET had complied with section 504. ED did not purport to determine what obligation KCET has under section 504, flowing from its receipt of more than two million dollars from the Corporation for Public Broadcasting (Pet. 23), nor did it concern itself with how KCET handled the Federal financial assistance it received from numerous other Federal agencies. Instead ED merely required, as the Court of Appeals noted (Pet. App. 11), that where ED produced a program with captions and made that program available to KCET, the station was required to broadcast the program with captions.

---

[1] Respondent KCET gives the false impression that the adjudication was in August 1981 (KCET Opp. 4, n. 7). The decision is appended to KCET's Brief in *Gottfried I* and clearly reveals that it is dated February 12, 1982, some three months after the District Court entered judgment herein.

The Court of Appeals appears to acknowledge that adjudication, rather than regulation, is inappropriate for setting policy with regard to captioning programs for hearing impaired people (Pet. App. 9). The Court held however that petitioners could not raise this issue because they "are not regulated parties." This startling proposition finds no support in the law. The regulations implementing section 504 are primarily for the benefit of disabled people, not for the benefit of recipients of Federal financial assistance. In enacting section 504, Congress conferred rights on disabled individuals, and mandated that the responsible federal agencies issue appropriate regulations to assure that these rights are honored and enforced. *Cherry v. Matthews*, 419 F.Supp. 922 (D.D.C. 1976); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1280-82 (7th Cir. 1977). *See, Adam v. Richardson*, 480 F.2d 1159 (D.C.C. 1973). Petitioners have a private cause of action to enforce their rights under section 504. *Darrone, supra.*

The Federal respondents assert that the Executive Department acted "in good faith" when it explicitly acknowledged the necessity for a regulation, explicitly acknowledged responsibility for issuing it promptly, and repeatedly assured the District Court that the regulation would be forthcoming expeditiously (Fed. Opp. 8). They have not however explained why they changed positions. *See, Motor Vehicle Manufacturers Association v. State Farm Mutual*, _____ U.S. _____, 103 S.Ct. 2856 (1983).

3. The federal defendants do not deny that the FCC has a duty under the Communications Act to assure itself that its television licensees take positive steps to make their programs understandable and available to their hearing impaired viewers. As this Court stated in *Gottfried I*, no licensee "whether commercial or public, may simply

ignore the needs of the hearing impaired in discharging its responsibilities to the community which it serves." 103 S.Ct. at 892. The federal respondents assert that the Commission has met its obligation by relying on "voluntary" action by television broadcasters (Fed. Opp. 10). In *Gottfried I* counsel for the FCC advised the Court that the Commission "requires the transmission of emergency announcements in visual form." For the rest, "[i]t has decided that . . . mandatory requirements should not be imposed" (Tr. of Argument October 12, 1982, 23). The District Court correctly concluded that the absence of mandatory requirements has resulted in discrimination against hearing impaired people (Pet. App. 33).

Finally, the Commission must issue a section 504 regulation because it grants Federal financial assistance within the meaning of *Grove City College v. Bell*, _____ U.S. _____, 104 S.Ct. 1211 (1984) (Pet. 15-19), and because it is an "executive agency" required by the 1978 amendment to section 504, to issue a regulation (Pet. 19).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ABRAHAM GOTTFRIED,
Professional Corporation

STANLEY FLEISHMAN,
A Professional Corporation

CHARLES M. FIRESTONE,
Communications Law Program,
UCLA School of Law,

By STANLEY FLEISHMAN,
Counsel of Record

Of Counsel:

RODNEY R. JONES,
PAUL L. HOFFMAN,
LAW INSTITUTE FOR THE
DISABLED AND ELDERLY,
Southwestern Unitersity
School of Law,

SAMUEL ROSENWEIN

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 1, 1984, I served the within *Petitioners' Reply Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530

THEODORE D. FRANK
RODNEY F. PAGE
CRAIG ISCOE
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 1, 1984, at Los Angeles, California.

Robin J. McColgan
(Original signed)